Due service of the within Petition is hereby acknowledged this.....day of March, A. D. 1933.

_____

_____

Attorneys for Respondent.

CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 663

THE STATE OF WASHINGTON ON THE RELATION OF BOND & GOODWIN & TUCKER, INCORPORATED, A DISSOLVED DELAWARE CORPORATION, APPELLANT,

vs.

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SPOKANE COUNTY AND HONORABLE JOSEPH B. LINDSLEY, JUDGE THEREOF

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

FILED FEBRUARY 8, 1933

(37,360)

(37,360)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 21, 1933

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IN SUPREME COURT OF WASHINGTON

No. 24002

STATE OF WASHINGTON on the Relation of BOND & GOODWIN & Tucker, Incorporated, a Dissolved Delaware Corporation, Realtor,

v.

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SPOKANE COUNTY and Honorable Joseph B. Lindsley, Judge Thereof, Respondent

STATE OF WASHINGTON,
County of King, ss:

AFFIDAVIT AND APPLICATION FOR WRIT OF PROHIBITION—Filed May 19, 1932

Frank E. Holman, being first duly sworn, on oath deposes and says:

I

That he is one of the attorneys for the Relator, Bond & Goodwin & Tucker, Incorporated, a dissolved Delaware corporation, and, without waiving the special appearance heretofore made in behalf of said Relator in Cause No. 90,636 in the Superior Court of the State of Washington for Spokane County, entitled: W. A. Monroe, Plaintiff, v. Vancouver Kraft Company, Ltd., a corporation, Bond & Goodwin & Tucker, Inc., a corporation, et al., Defendants, makes this affidavit in behalf of said Relator in support of its application for a writ of prohibition herein.

II

That prior to the 18th day of April, 1932 W. A. Monroe commenced an action in the Superior Court for Spokane County, being Cause No. 90,636 aforesaid; that on the 18th day of April, 1932 plaintiff caused one copy of his summons and complaint in said action to be left in the office of the

Secretary of State of the State of Washington, a certified [fol. 2] copy of which summons is hereto attached marked Exhibit A and made a part hereof; that the return and proof of service herein as against said defendant Bond & Goodwin & Tucker, Incorporated, a certified copy of which return is hereto attached, marked Exhibit B and made a part hereof, discloses that the only service of said summons and complaint upon the said Bond & Goodwin & Tucker, Incorporated was attempted by leaving a copy thereof in the office of the said Secretary of State of the State of Washington, as aforesaid, with one A. M. Kitto, Assistant Secretary of State; that neither the Secretary of State nor said Assistant Secretary of State forwarded to said defendant Bond & Goodwin & Tucker, Incorporated or any of its officers or agents, said summons and complaint, so left as aforesaid, or any copy thereof, or any notice regarding the same, and the said Secretary of State of the State of Washington claims to be under no legal duty to forward to said Bond & Goodwin & Tucker, Incorporated or any of its officers or agents said summons and complaint and under no legal duty to furnish said Bond & Goodwin & Tucker, Incorporated with a copy thereof or any notice regarding the same.

III

That except for the purported service upon the office of the Secretary of State, as aforesaid, the record herein discloses that no service of summons or complaint has been made or attempted upon Bond & Goodwin & Tucker, Incorporated, and that said Bond & Goodwin & Tucker, Incorporated has in fact received no copy of any summons or complaint in said action or any notice or knowledge of the character of the action, except through hearsay and report.

IV

That the record discloses that Bond & Goodwin & Tucker, Incorporated withdrew from transacting business in the State of Washington and ceased to transact any business in the State of Washington after November 29, 1929; that on [fol. 3] or about the same date said corporation, being a Delaware corporation, was duly dissolved under and pursuant to the provisions of the laws of the State of Delaware

and a certificate of such dissolution was duly issued by the Secretary of State of the State of Delaware on December 11, 1929; that at and prior to the withdrawal of said corporation from the State of Washington one Duncan Shaw of Seattle, Washington was the statutory agent of said corporation upon whom service of process might be had; that the records in the office of the Secretary of State show that said appointment of Duncan Shaw as statutory agent has never been revoked; that said Duncan Shaw moved from the State of Washington in the year 1929.

V

That on the 7th day of May, 1932, the Relator, Bond & Goodwin & Tucker, Incorporated, specially appearing in the cause for that purpose and no other, duly filed its motion to quash service of process, supported by affidavits, a certified copy of which motion and accompanying affidavits is hereto attached, marked Exhibit C and made a part hereof.

VI

That thereafter, on or about the 10th day of May, 1932, plaintiff caused to be filed in said cause two certain affidavits resisting said motion, certified copies of which affidavits are marked Exhibit D, hereto attached and made a part hereof.

VII

That thereafter, on the 14th day of May, 1932 the Relator's said motion to quash came on for hearing before the Honorable Joseph B. Lindsley, Judge of the Superior Court for Spokane County and after argument by respective counsel said court denied said motion, but allowed ten days to [fol. 4] Relator to apply to this Court for an Alternative Writ of Prohibition and/or Certiorari, and thereafter entered an order, a certified copy of which order and Relator's application for stay of proceedings are hereto attached, marked respectively Exhibit E and Exhibit F and made a part hereof.

VIII

That the provisions of §3854 Remington's Compiled Statutes of Washington (1922), under which service of sum-

mons and complaint upon the Relator, Bond & Goodwin & Tucker, Incorporated was attempted by leaving one copy of said summons and complaint in the office of the Secretary of State, as aforesaid, deprive the Relator of its property without due process of law in violation of the provisions of Clause 1 of the Fourteenth Amendment to the Constitution of the United States and are therefore unconstitutional and void, and the said purported service of process is null and void and of no effect and the said Superior Court of Spokane County has acquired no jurisdiction over the person of the Relator by reason thereof, in that the particular provisions of said §3854 regarding service upon a foreign corporation, where such corporation has withdrawn from the State, do not require the Secretary of State or the plaintiff in the action to give said corporation any notice of such service or any copy of the complaint or summons, or in any other way to give such corporation any notice or information as to the nature and character of the action so as to enable such corporation to make a defense thereto.

IX

That said provisions of said §3854 Remington's Compiled Statutes of Washington (1922) deny to the Relator the equal protection of the laws, in violation of Clause 1 of the Fourteenth Amendment to the Constitution of the United [fol. 5] States in that said provisions of said section wrongfully discriminate against a foreign corporation like the Relator in that said provisions are less favorable than the similar provisions regarding service contained in §227 Remington's Compiled Statutes of Washington (1922) as to service on domestic corporations where no officer or agent of such corporation can be found in the State; and said provisions also wrongfully discriminate against a foreign corporation like Relator in that they are less favorable than the similar provisions of §7044 Remington's Compiled Statutes of Washington (1922) regarding service on foreign insurance companies.

X

That §3854 does not itself, by its own terms, authorize service upon the Secretary of State when a foreign corporation has duly appointed a statutory agent and has itself

not revoked the appointment, and service is attempted on the Secretary of State merely because the duly appointed agent has himself left the State.

XI

That if the alleged service was in fact made on Mr. Kitto, the Assistant Secretary of State, as the return of service on file shows, the service is void under the statute, §3854, and also void because in conflict with Clause 1 of the Fourteenth Amendment to the Constitution of the United States, as aforesaid.

XII

That as affiant is informed and believes and therefore alleges, the complaint in this action is very voluminous, consisting of 478 closely printed pages, containing 157 causes of action, and would require a stenographer about three weeks to make a copy of same; that any trial of the cause will be long and expensive, with resultant great and unnecessary loss and damage to the Relator if it is required to [fol. 6] go to trial in the Superior Court for Spokane County and this Honorable Court thereafter determines that the said Superior Court for Spokane County acquired no jurisdiction over this Relator.

XIII

That, by reason of the foregoing considerations, the Superior Court of the State of Washington for Spokane County has no jurisdiction over the Relator, Bond & Goodwin & Tucker, Incorporated and has no jurisdiction in said cause No. 90,636, to proceed therein against said Relator; yet, unless restrained and prohibited by this Honorable Court, said Superior Court will proceed with the trial of said cause as against this Relator without having acquired jurisdiction as aforesaid, to the great loss and damage of the Relator, as herein shown; and the Relator has no plain, speedy and adequate remedy in the ordinary course of law.

XIV

That the said Superior Court for Spokane County in denying Relator's said motion to quash acted unlawfully, illegally, and without jurisdiction, and in violation of the

provisions of Clause 1 of the Fourteenth Amendment, and contrary to the decisions of the Supreme Court of the United States in similar cases.

Wherefore, Relator prays that a writ of prohibition be issued by this Honorable Court, directed to the Superior Court for Spokane County and to the Honorable Joseph B. Lindsley, Judge thereof, prohibiting said Superior Court for Spokane County and the judges thereof from proceeding with the trial of said cause as against the Relator, Bond & Goodwin & Tucker, Incorporated and from exercising any jurisdiction therein over said Relator; and commanding said Superior Court for Spokane County and [fol. 7] the judges thereof to desist and refrain from further proceedings in the matter specified herein until the further order of this Court, and to show cause before this Honorable Court in its courtroom at Olympia, Washington, on the — day of June, 1932, at the hour of 10 o'clock A. M. of said day, or as soon thereafter as counsel may be heard, why they and each of them should not be absolutely restrained from further proceedings in said matter as against said Relator, Bond & Goodwin & Tucker, Incorporated.

Frank E. Holman.

Subscribed and sworn to before me this 19th day of May, 1932. Eugene C. Luccock, Notary Public in and for the State of Washington, residing at Seattle. Todd, Holman & Sprague, Attorneys for Relator.

[fol. 8] Exhibit "A" to Affidavit and Application

In Superior Court of the State of Washington, County of Spokane

No. 90636

W. A. Monroe, Plaintiff,

v.

Vancouver Kraft Company, Ltd., a Corporation; Bond & Goodwin & Tucker, Inc., a Corporation; Gates Valve Bag Corporation, a Corporation; Columbia River Paper Mills, a Corporation, and Fred W. Leadbetter, Defendants

SUMMONS—Filed April 9, 1932

The State of Washington to Vancouver Kraft Company, Ltd., a Corporation; Bond & Goodwin & Tucker, Inc., a Corporation; Bates Valve Bag Corporation, a Corporation; Columbia River Paper Mills, a Corporation, and Fred W. Leadbetter, Defendants:

You, and each of you, are hereby summoned to appear within twenty (20) days after the service of this Summons upon you, exclusive of the day of service, and defend the above entitled action in the Court aforesaid, and answer the Complaint of plaintiff, and serve a copy of your Answer upon the attorneys whose names are subscribed to this Summons, at their address below stated, and, in case of your failure so to do, Judgment will be rendered against you according to the demand and prayer of the Complaint in said action, which will be filed with the Clerk of said Court, and a copy of which is herewith served upon you.

Wakefield & Witherspoon, Kimball & Blake, Herbert W. Erskine, 1224 Old National Bank Building, Spokane, Washington, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 9] EXHIBIT "B" TO AFFIDAVIT AND APPLICATION

IN SUPERIOR COURT OF THE STATE OF WASHINGTON, COUNTY OF THURSTON

No. 90636

[Title omitted]

SHERIFF'S RETURN OF SERVICE—Filed May 6, 1932

STATE OF WASHINGTON,
County of Thurston, ss:

I, Claud Havens, Sheriff of Thurston County, State of Washington, do hereby certify that I received the Summons & Complaint on the 16th day of April, 1932; that on the 18th day of April, 1932, I duly served the same on Bond & Good-

win & Tucker, Inc., a corp'n, by delivering to and leaving with A. M. Kitto, Assistant Secretary of State for said defendant personally, in said Thurston County, a copy of said Summons & Complaint.

Dated this 18th day of April, 1932.

Claud Havens, Sheriff of Thurston County, Washington, by E. C. Teen, Deputy.

Sheriff's Fee: Service, $ 60; Mileage, $ 20.

[File endorsement omitted.]

[fol. 10] EXHIBIT "C" TO AFFIDAVIT AND APPLICATION

IN SUPERIOR COURT OF THE STATE OF WASHINGTON, COUNTY OF SPOKANE

No. 90636

[Title omitted]

SPECIAL APPEARANCE AND MOTION OF DEFENDANT BOND & GOODWIN & TUCKER, INCORPORATED, A DISSOLVED DELAWARE CORPORATION, FOR THE SOLE PURPOSE OF MOVING TO SET ASIDE THE RETURN AND QUASH SERVICE OF SUMMONS AND COMPLAINT AS AGAINST SAID DEFENDANT—Filed May 7, 1932

Comes now the defendant Bond & Goodwin & Tucker, Incorporated, a dissolved Delaware corporation, and appearing specially through its undersigned attorneys for the purpose of this motion and not otherwise, moves the Court to set aside the return and quash the purported service of summons and complaint in this action, so far as the same relates to said defendant, for the following reasons:

(1) That no service of the summons and complaint herein has been made upon said Bond & Goodwin & Tucker, Incorporated, or upon any officer or agent of said Bond & Goodwin & Tucker, Incorporated, and neither said Bond & Goodwin & Tucker, Incorporated, nor any of its officers or agents have in fact received any summons or complaint herein, or any notice or knowledge of the character or

[fol. 11] nature of the action, except through hearsay and report.

(2) That the purported service of summons and complaint herein upon said defendant Bond & Goodwin & Tucker, Incorporated, was made on or about the 18th day of April, 1932 by plaintiff's causing one copy of said summons and complaint to be left with the Secretary of State of the State of Washington; that the return and proof of service herein as against said defendant Bond & Goodwin & Tucker, Incorporated discloses that the only service of said summons and complaint upon the said Bond & Goodwin & Tucker, Incorporated was attempted by leaving a copy thereof with said Secretary of State of the State of Washington.

That the said Secretary of State of the State of Washington did not forward to said defendant Bond & Goodwin & Tucker, Incorporated, or any of its officers or agents, said summons and complaint so left with him or any copy thereof or any notice regarding the same, and claims to be under no legal duty to forward to said defendant Bond & Goodwin & Tucker, Incorporated, or any of its officers or agents, said summons and complaint and under no legal duty to furnish said defendant Bond & Goodwin & Tucker, Incorporated with a copy thereof or any notice regarding the same.

(3) That the provisions of §3854 Remington's Compiled Statutes of Washington (1922), under which service of summons and complaint was attempted upon said defendant Bond & Goodwin & Tucker, Incorporated, are in conflict with the provisions of Clause 1 of the Fourteenth Amendment to the Constitution of the United States and therefore unconstitutional and void for the reason that the particular provisions of said section regarding service upon a foreign corporation, where such corporation has withdrawn from the State, do not require the Secretary of State to give such corporation any notice of said service.

[fol. 12] (4) That the provisions of said §3854 Remington's Compiled Statutes of Washington (1922) are also in conflict with Clause 1 of the Fourteenth Amendment to the Constitution of the United States in that the provisions of

said section wrongfully discriminate against a foreign corporation in that they are less favorable than the similar provisions regarding service contained in §227 Remington's Compiled Statutes of Washington (1922) as to service on domestic corporations where no officer or agent of said corporation can be found in the State, and further wrongfully discriminate against a foreign corporation like the defendant Bond & Goodwin & Tucker, Incorporated herein in that they are less favorable than the similar provisions of §7044 Remington's Compiled Statutes of Washington (1922) regarding service on foreign insurance companies.

(5) That even if §3854 Remington's Compiled Statutes of Washington (1922) is constitutional, it does not, by its own terms, authorize service of summons and complaint upon defendant Bond & Goodwin & Tucker, Incorporated by leaving a copy thereof with the Secretary of State of the State of Washington, since there is on file with said Secretary of State an appointment of a statutory agent which has never been revoked.

(6) Moreover, if the attempted service was in fact on Mr. Kitto, the Assistant or Deputy Secretary of State, as a return of service on file shows, or seems to indicate, the service is bad per se and equally bad under the constitutional objections above relied upon.

This motion is based upon the records and files herein and upon the affidavits of Donald Y. Lamont, Benton G. Wood, and J. Grant Hinkle, hereto attached.

Todd, Holman & Sprague, Attorneys Appearing Specially for Defendant Bond & Goodwin & Tucker, Incorporated, a Dissolved Delaware Corporation.

[File endorsement omitted.]

[fol. 13] Affidavit of Donald G. Lamont—Filed May 7, 1932

State of California,
City and County of San Francisco, ss:

Donald Y. Lamont, being by me first duly sworn, deposes and says:

That he is, and at all of the times herein mentioned has been, an attorney-at-law with offices and practicing in the City and County of San Francisco, State of California.

That he is familiar with, had charge of and directed the proceedings taken and had leading up to and culminating in the withdrawal of Bond & Goodwin & Tucker Incorporated, a dissolved Delaware corporation, from the State of Washington, and the dissolution of said corporation.

That at a meeting of the Board of Directors of said corporation held on the 29th day of November, 1929, a resolution was duly adopted providing, among other things, that said corporation withdraw from the transactions of business in said State of Washington and cease to transact any further business in said state, and that the President and Secretary of said corporation be authorized and directed to take such steps as might be necessary to bring about the withdrawal of said corporation from the transaction of business in said State of Washington; that pursuant to the authority conferred by said resolution, a Certificate of Withdrawal of said corporation from said State of Washington, dated November 29th, 1929, was filed in the office of the Secretary of State of said State of Washington on the 5th day of December, 1929.

That at a meeting of the Board of Directors of said corporation held on the 29th day of November, 1929, a resolution was duly adopted providing that whereas it was [fol. 14] deemed advisable, in the judgment of said Board of Directors, and most for the benefit of said corporation that said corporation should be dissolved, that said corporation be dissolved and that the written consent of all of the stockholders of said corporation to said dissolution be obtained, and that the President and Secretary and Treasurer of said corporation should, upon the obtaining of said written consent of said stockholders to said dissolution, file said consent in the office of the Secretary of State of the State of Delaware, together with a list of the names and residences of the directors and officers of said corporation certified by said President and Secretary and Treasurer; that all of the stockholders of said corporation having voting power, consented in writing to the dissolution thereof, and pursuant to the authority conferred by said resolution, said consent, together with a list of the names and resi-

dences of the directors and officers of said corporation, certified by said President and Secretary and Treasurer, was filed in the office of the Secretary of State of said State of Delaware on the 11th day of December, 1929, in compliance with the provisions and requirements of Section 39 of the General Corporation Law of said State of Delaware, being Chapter 65 of the Revised Statutes of 1915 of said State of Delaware, as amended.

That on said 11th day of December, 1929, said Secretary of State of said State of Delaware issued that certain Certificate of Dissolution, a true copy of which is attached hereto and marked Exhibit "A", and by this reference thereto made a part hereof, which said Certificate he caused to be published in one issue in a newspaper published in the county wherein the principal office of said dissolved corporation was situated and that said Secretary of State [fol. 15] caused an affidavit of the manager or publisher of said newspaper that said Certificate had been published one time, in said newspaper, to be filed in the office of said Secretary of State, which said Certificate of Dissolution was recorded in the office of the Recorder of the County in which the principal office of said corporation was maintained, to-wit, in the office of the Recorder of New Castle County, State of Delaware, on said 11th day of December, 1929, as provided by law.

Donald Y. Lamont.

Subscribed and sworn to before me this 27th day of April, 1932. Kathryn E. Stone, Notary Public in and for the City and County of San Francisco, State of California. (Notary Seal.)

[File endorsement omitted.]

[fol. 16] Exhibit "A" to Affidavit of Donald G. Lamont

State of Delaware, Office of Secretary of State

Certificate of Dissolution

To all whom these presents may come, Greeting:

Whereas, It appears to my satisfaction by duly authenticated record of the proceedings for the voluntary dissolu-

tion thereof, by the consent of all the stockholders deposited in my office, the Bond & Goodwin & Tucker, Incorporated, a corporation of this State whose principal office is situated at No. 7 West 10th Street, in the City of Wilmington, County of New Castle, State of Delaware, Corporation Trust Company of America being agent therein, and in charge thereof, upon whom process may be served, has complied with the requirements of the Corporation Laws of the State of Delaware, as contained in 1915, Section 1, to 2101, Section 187, Chapter 65 of the Revised Statutes of 1915, as amended, preliminary to the issuing of this certificate of dissolution,

Now, therefore, I, Charles H. Grantland, Secretary of State of the State of Delaware, do hereby certify that the said corporation did on the eleventh day of December A. D. 1929 file in the office a duly executed and attested consent, in writing, to the dissolution of said corporation executed by all the stockholders thereof, which said consent and the records of the proceedings aforesaid are now on file in my said office as provided by law.

In testimony whereof, I have hereunto set my hand and official seal, at Dover, this eleventh day of December in the year of our Lord one thousand nine hundred and twenty-nine.

(Signed) Charles H. Grantland, Secretary of State.
(Seal.)

[fol. 17] AFFIDAVIT OF BENTON G. WOOD—Filed May 7, 1932

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Benton G. Wood, being first duly sworn, deposes and says: That he was prior to the dissolution of Bond & Goodwin & Tucker, Incorporated, a Delaware corporation, the Secretary of said corporation, and that he is and at all times herein mentioned has been the Secretary of said Bond & Goodwin & Tucker, Incorporated, insofar as such office exists after the dissolution of said corporation; that no copy of the complaint or summons in an action in the Superior Court of the State of Washington, in and for the County of Spokane, entitled "W. A. Monroe, Plaintiff, vs.

Vancouver Kraft Company, Ltd., a corporation; Bond & Goodwin & Tucker, Inc., a corporation; Bates Valve Bag Corporation, a corporation; Columbia River Paper Mills, a corporation; and Fred W. Leadbetter, Defendants", and numbered 90636, has been delivered to or in any way served upon him, and that said action and the pendency thereof came to the knowledge of affiant only through hearsay; that upon information and belief affiant deposes and says that no copy of the complaint or summons in said action has been delivered to or in any way served upon any officer or director of said Bond & Goodwin & Tucker, Incorporated, a dissolved Delaware corporation.

Benton G. Wood.

Subscribed and sworn to before me this 29th day of April, 1932. Kathryn E. Stone, Notary Public in and for the City and County of San Francisco, State of California. (Seal.)

[File endorsement omitted.]

[fol. 18] In Superior Court of the State of Washington, County of Spokane

No. 90636

[Title omitted]

Affidavit of J. Grant Hinkle, Secretary of State—Filed May 7, 1932

State of Washington,
County of Thurston, ss:

J. Grant Hinkle, being first duly sworn, deposes and says:

That he is now and has been for more than ten years last past the duly elected, qualified and acting Secretary of State of the State of Washington.

That on April 18, 1932 the Deputy Sheriff of Thurston County, Washington left with affiant one copy of the summons and complaint in the above entitled action, stating to

affiant that said copy of said summons and complaint was left with affiant for the purpose of securing jurisdiction of the defendant Bond & Goodwin & Tucker, Incorporated and making service thereon. That affiant caused said copy of summons and complaint so left with him to be stamped "Received" and filed in his office. That said summons and complaint was too voluminous to be readily copied and affiant has not furnished said defendant Bond & Goodwin & Tucker, Incorporated, or any of its officers or agents, with a copy of said summons and complaint, or any notice [fol. 19] thereof, and affiant knows of no statute requiring him to forward a copy of such summons and complaint, or notice thereof, to said defendant Bond & Goodwin & Tucker, Incorporated, or any of its officers or agents.

That the records in affiant's office disclose that said Bond & Goodwin & Tucker, Incorporated on April 9, 1926 appointed one Duncan Shaw, of Seattle, Washington, its statutory agent and filed notice of said appointment in affiant's office; that so far as affiant's records show, said appointment of Duncan Shaw has never been revoked; that so far as affiant's records disclose, affiant has never been appointed as an agent of Bond & Goodwin & Tucker, Incorporated for the purpose of service of process or otherwise.

That affiant's records disclose that a certificate of withdrawal of said Bond & Goodwin & Tucker, Incorporated dated November 29, 1929 was filed in the office of affiant December 5, 1929.

J. Grant Hinkle.

Subscribed and sworn to before me this 2nd day of May, 1932. A. M. Kitto, Notary Public in and for the State of Washington, Residing at Olympia, (Seal.)

[File endorsement omitted.]

[fol. 20] EXHIBIT "D" TO AFFIDAVIT AND APPLICATION

IN SUPERIOR COURT OF THE STATE OF WASHINGTON, COUNTY OF SPOKANE

No. 90636

[Title omitted]

AFFIDAVIT OF CLARK ERWIN—Filed May 6, 1932

STATE OF WASHINGTON,
County of Spokane, ss:

Clark Erwin, being first duly sworn on his oath, deposes and says:

That he is well acquainted with Duncan Shaw, formerly of Seattle, Washington; that the said Duncan Shaw is a brother-in-law to affiant; that affiant knows that Duncan Shaw removed from the State of Washington sometime during the year 1929 and ever since said time has been a resident of the State of California; that said Duncan Shaw is the same Duncan Shaw who was formerly the *the* statutory agent for the State of Washington of Bond & Goodwin & Tucker, Inc.

Clark Erwin.

Subscribed and sworn to before me this 4th day of May, 1932. P. W. Kimball, Notary Public for the State of Washington, Residing at Spokane.

[File endorsement omitted.]

[fol. 21] EXHIBIT "D" TO AFFIDAVIT AND APPLICATION

IN SUPERIOR COURT OF THE STATE OF WASHINGTON, COUNTY OF SPOKANE

No. 90636

[Title omitted]

AFFIDAVIT OF PARKER W. KIMBALL—Filed May 11, 1932

STATE OF WASHINGTON,
County of Spokane, ss:

Parker W. Kimball, being first duly sworn on his oath, deposes and says:

That he is one of the attorneys for the above named plaintiff and makes this affidavit in his behalf; that affiant

is familiar with the general corporation law of the State of Delaware, which said law was enacted March 10, 1899, amended by the revised statute in 1915, and further amended by the 95th, 96th, 97th, 99th, 100th, 101st, 102nd and 103rd general assembly of said State of Delaware; that section 40 of said general corporation law of the State of Delaware, which is now in force and effect and was in force and effect on the eleventh day of December, 1929, reads as follows:

"Sec. 40. Continuation of Corporation After Dissolution for Purposes of Suit, Etc.—All corporations, whether they expire by their own limitation, or are otherwise dissolved, shall nevertheless be continued for the term of three years from such expiration or dissolution bodies corporate for the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their property, and to divide their capital stock but not for the purpose of continuing the business for which said corporation shall have been established; provided, however, that with respect to any action, suit or proceeding begun or commenced by or against the corporation prior to such expira-
[fol. 22] tion or dissolution and with respect to any action, suit or proceeding begun or commenced by the corporation within three years after the date of such expiration or dissolution, such corporation shall only for the purpos*t* of such action, suits or proceedings so begun or commenced be continued bodies corporate beyond said three-year period and until any judgments, orders, or decrees therein shall be fully executed."

That there is on file in said action the certificate of J. Grant Hinkle, Secretary of State of the State of Washington, certifying that the said Bond & Goodwin & Tucker, Inc., filed a certificate of withdrawal from the State of Washington on December 5, 1929, and that at the time of its withdrawal Duncan Shaw of Seattle, Washington was the statutory agent of said corporation upon whom service of process might be had; that affiant knows that said Duncan Shaw removed from the State of Washington during the year 1929; that the records of the office of the Secretary

of State, as will appear from the certificate of J. Grant Hinkle, show that no new appointment of statutory agent has been made for said defendant corporation.

Parker W. Kimball.

Subscribed and sworn to before me this 9th day of May, 1932. Charles P. Lund, Notary Public for the State of Washington, Residing at Spokane.

[File endorsement omitted.]

[fol. 23] EXHIBIT "E" TO AFFIDAVIT AND APPLICATION

IN SUPERIOR COURT OF THE STATE OF WASHINGTON, COUNTY OF SPOKANE

No. 90636

[Title omitted]

ORDER DENYING MOTION TO QUASH—Filed May 16, 1932

This matter came on regularly for hearing on May 14, 1932, upon special appearance of defendant, Bond & Goodwin & Tucker, Inc., with motion to quash the service of summons and complaint in said action.

Upon hearing said motion and the argument of the same and being fully advised in connection therewith;

It is hereby ordered that said motion be and the same is hereby denied with exception granted to said defendant;

It is further ordered that a stay of proceedings for a period of ten days be and is hereby granted to said defendant.

Done in open court this 16th day of May, 1932.

Joseph B. Lindsley, Superior Judge.

Bruce Blake.

[File endorsement omitted.]

[fol. 24] EXHIBIT "F" TO AFFIDAVIT AND APPLICATION

IN SUPERIOR COURT OF THE STATE OF WASHINGTON, COUNTY OF SPOKANE

No. 90636

[Title omitted]

SPECIAL APPLICATION FOR STAY OF PROCEEDINGS—Filed May 14, 1932

The motion of Bond & Goodwin & Tucker, Incorporated heretofore made herein to quash service of summons and complaint having been denied by the Court—comes now said Bond & Goodwin & Tucker, Incorporated, through its undersigned attorneys, and relying upon and reserving its special appearance and its said motion to quash and not intending to appear generally, hereby requests a fifteen-day stay of proceedings as against it in order to enable its attorneys to apply to the Supreme Court of the State of Washington for an alternative writ of prohibition and/or certiorari for the sole purpose of seeking a review in said appellate court of the action of this Court in denying said motion to quash.

Todd, Holman & Sprague, Attorneys Appearing Specially for Defendant Bond & Goodwin & Tucker, Incorporated, a Dissolved Delaware Corporation.

[File endorsement omitted.]

[fol. 25] Clerk's certificate to foregoing papers omitted in printing.

[fol. 26] [File endorsement omitted]

IN SUPREME COURT OF WASHINGTON

No. 24002

[Title omitted]

ORDER TO SHOW CAUSE AND ALTERNATIVE WRIT OF PROHIBITION—Filed May 19, 1932

The State of Washington to the Superior Court of the State of Washington for Spokane County and to the Honorable Joseph B. Lindsley, as Judge Thereof:

Whereas the Relator above named, Bond & Goodwin & Tucker, Incorporated, has heretofore filed herein its Application and Affidavit for Writ of Prohibition and for an Order directing the Superior Court for Spokane County and said Hon. Joseph B. Lindsley, as Judge thereof, to show cause, if any they have, why the Writ of Prohibition should not be issued as prayed for in said Application, and also for an Order of this Court directing said parties to desist and refrain from further proceedings as against said Relator, Bond & Goodwin & Tucker, Incorporated, in Cause No. 90636 in the Superior Court for Spokane County entitled: W. A. Monroe, Plaintiff, v. Vancouver Kraft Company, Ltd., a corporation, Bond & Goodwin & Tucker, Inc., a corporation, et al., Defendants, and particularly to desist and refrain from exercising any jurisdiction over said Relator in said cause; and

[fol. 27] Said Relator having shown good cause for the issuance of an Order to Show Cause and Alternative Writ of Prohibition herein;

Now, therefore, you are hereby commanded to be and appear before this Court on the 10th day of June, 1932 at the hour of 10 o'clock A. M. of said day, at the court room of this Court at Olympia, Washington, then and there to show cause, if any you have, why the Writ of Prohibition as prayed for in said Application (copy of which Application is hereby ordered to be served upon you with this Order) should not be granted.

You are also further commanded to desist and refrain from any further proceedings in said matter against said Relator, Bond & Goodwin & Tucker, Incorporated, and from exercising any jurisdiction over said Relator in said Cause No. 90636 until the further order of this Court.

This Order, when attested by the Clerk of this Court, shall constitute an Alternative Writ of Prohibition and may be served upon said Superior Court for Spokane County and the Judges thereof by delivering to respondent Joseph B. Lindsley a true and correct copy of this Order, together with a true and correct copy of Relator's Application and Affidavit referred to herein.

Dated at Olympia this 19 day of May, 1932.

Warren W. Tolman, Chief Justice.

Attest:

Fred S. Guyot, Deputy Clerk.

[fol. 28] [File endorsement omitted]

IN SUPREME COURT OF WASHINGTON

No. 24002

[Title omitted]

DEMURRER—Filed June 9, 1932

Comes now the respondent in the above entitled action and demurs to the application of the relator herein on the ground and for the reason that said application and the petition supporting the same do not state facts to entitle the relator to the relief prayed for or to any relief.

Kimball & Blake, Wakefield & Witherspoon, Herbert W. Erskine, Attorneys for Respondent.

Service admitted June 8th, 1932.

Todd, Holman & Sprague, Attorneys for Relator.

[fol. 29] IN SUPREME COURT OF WASHINGTON

No. 24002

[Title omitted]

RETURN TO ALTERNATIVE WRIT OF PROHIBITION

STATE OF WASHINGTON,
County of Spokane, ss:

Joseph B. Lindsley, being first duly sworn, deposes and says:

That the complaint in the above entitled action consists of one hundred and fifty-seven causes of action, all of which are identical except as to the name of the assignor of the respective causes of action, the par value of the bonds purchased by such assignor and the amount of damage claimed; that Exhibit "A" hereto attached is a true

and correct copy of the first cause of action set out in the complaint.

Joseph B. Lindsley.

Subscribed and sworn to before me this 27th day of June, 1932. P. W. Kimball, Notary Public for the State of Washington, Residing at Spokane.

[fol. 30] EXHIBIT "A" TO RETURN

IN SUPERIOR COURT OF THE STATE OF WASHINGTON, COUNTY OF SPOKANE

No. 90636

W. A. MONROE, Plaintiff,

vs.

VANCOUVER KRAFT COMPANY, LTD., a Corporation; BOND & GOODWIN & TUCKER, INC., a Corporation; Bates Valve Bag Corporation, a Corporation; Columbia River Paper Mills, a Corporation, and Fred W. Leadbetter, Defendants.

COMPLAINT

Comes now W. A. Monroe and for Complaint against the defendants alleges:

First Cause of Action

I

That Vancouver Kraft Company, Ltd., is a corporation, organized and existing under the laws of British Columbia, and doing business in the State of Washington; that Bond & Goodwin & Tucker, Inc., is a corporation organized under the laws of the State of Delaware, and, at the time the cause of action herein set forth arose, was authorized to do business in the State of Washington, had an office for transaction of business in and was transacting business in Spokane County, Washington; that Bates Valve Bag Corporation is a corporation, organized and existing under the

laws of the State of New Jersey, and at all times herein mentioned was and is doing business in the State of Washington; that Columbia River Paper Mills is a corporation, organized and existing under the laws of the State of Washington, and at all times herein mentioned was and is doing business in the State of Washington.

II

That, sometime prior to the month of May, 1928, the defendants, Fred W. Leadbetter, Columbia River Paper Mills and Bates Valve Bag Corporation, acquired some seventy acres of land at Port Mellon, British Columbia, upon which was situated the remnants of a kraft pulp mill. That plaintiff is informed and believes and therefore avers that, at the time of this purchase, the said kraft pulp mill was shut down and had not been operated for a number of years, and that the corporation which had operated it was defunct, and that it was acquired from the receiver, trustee or other person managing the affairs of said defunct corporation, and that said mill was not in any sense a going concern at the time of such acquisition. That contemporaneously with the said acquisition, the said Fred W. Lead- [fol. 31] better, Bates Valve Bag Corporation, Columbia River Paper Mills, and Bond & Goodwin & Tucker, Inc., for the purpose and with the intention and design of cheating and defrauding the public in general, and Genevieve Doran Porter, hereinafter in this cause of action called the purchaser, in particular, combined, confederated, connived, conspired and agreed together to form a corporation to acquire the said defunct kraft pulp mill, and to issue, sell and dispose of to the public, bonds of the par value of $1,000.00 and $500.00 each, in a total aggregate amount of $1,250,000.00 bearing interest at the rate of 6½%, purporting to be secured by a mortgage on said land and pulp mill; and to use the moneys derived from the issuance, sale and disposal of said bonds in the promotion scheme of rehabilitating the said mill and operating the said properties, so that they would derive profits from the sale of the bonds, and, if any profits were made from the operation of the mill, that they would get it, while, if a loss were suffered, persons lending the money by buying the bonds would suffer the loss. That, in furtherance of said design, pur-

pose and conspiracy to defraud the public in general and the said purchaser in particular, it was agreed that a corporation be organized to take over the property above referred to, and to issue and sell said bonds. That thereafter and in pursuance of, and in furtherance of said purpose, design and conspiracy, the defendants organized the Vancouver Kraft Company, Ltd., and caused the entire capital stock thereof to be issued to the defendants, Columbia River Paper Mills and Bates Valve Bag Corporation, and/or the agents and employees of both of said last mentioned corporations. That thereafter, and in pursuance of said conspiracy, and in pursuance of and in furtherance of said purpose, design and conspiracy, said defendants, Fred W. Leadbetter, Columbia River Paper Mills, Bates Valve Bag Corporation, and Bond & Goodwin & Tucker, Inc., caused the said Vancouver Kraft Company, Ltd., to issue said bonds in the principal sum of $1,250,000.00. That thereafter, and in pursuance of the said purpose, design and conspiracy, the said defendants, acting in concert and in performance of their common conspiracy, issued, offered for sale, sold and caused to be sold to the public in general and to the said purchaser in particular, the said bonds, and in so doing the said defendants made the following misrepresentations, to-wit:

(a) That Vancouver Kraft Company, Ltd., owned two thousand acres of timber land upon which there were forty million feet of timber suitable to the manufacture of kraft pulp;

(b) That the property of Vancouver Kraft Company, Ltd., was a going concern and engaged in producing high grade sulphate pulp used in the manufacture of kraft paper, and that the funds from the sale of the bonds would be used in the extension and improvement of its then present plant;

(c) That the Vancouver Kraft Company, Ltd., had entered into long term, binding and enforcible contracts with responsible persons, firms and corporations, among whom were the Columbia River Paper Mills and Bates Valve Bag Corporation, for its entire output at prices more than sufficient to cover operating and fixed charges and sinking

fund and interest requirements under the trust indenture given to secure the said bonds;

(d) That the Vancouver Kraft Company, Ltd., owned a water power site on which it would immediately erect a hydro-electric power plant capable of developing 2900 horsepower;

(e) That while the purported balance sheet and audit of Haskins & Sells showed liquid assets of only $73,483.49, the [fol. 32] Columbia River Paper Mills and Bates Valve Bag Corporation had subscribed for and were obligated to pay upon call for $400,000.00 of the preference 7% cumulative capital stock of the said Vancouver Kraft Company, Ltd., which would furnish the said Vancouver Kraft Company, Ltd., with sufficient and adequate working capital for its operations and for the completion of the additions and alterations of its plant for which it was represented the money from the sale of said bonds was to be used.

III

That each and all of the representations set forth in the preceding paragraph were false and untrue, and were known to be false by the said defendants at the time they were made. That they were uttered and made by the said defendants to the public generally, and to the said purchaser in particular, with the intention that they should rely upon them and be deceived by them, and with the intention that they should be induced by them to purchase the said bonds, which the said defendants had conspired, connived and colluded together to sell as aforesaid, and for the purpose of securing from them, as aforesaid, the moneys represented by the face amount of said bonds. That, in addition to the said misrepresentations, the said defendants failed and neglected to make it known to the said public in general, and to the said purchaser in particular, that the said plant had not been operated for a number of years, and was in no sense a going concern at the time of the acquisition of it by the said defendants. That, on the contrary, these defendants suppressed and concealed such information from the public in general, and from the said pur-

chaser in particular, for the said purpose and in pursuance of the said design and conspiracy.

IV

That the purported audit of Haskins & Sells was not a true statement of the assets or earning power of Vancouver Kraft Company, Ltd.; that Vancouver Kraft Company, Ltd., did not own two thousand acres of timber land nor forty million to fifty million feet of timber suitable to the manufacture of kraft pulp, and in fact did not own any timber land or timber suitable to the manufacture of kraft pulp; that Vancouver Kraft Company, Ltd., did not have long term enforcible contracts with responsible persons, firms and corporations, including the Columbia River Paper Mills and Bates Valve Bag Corporation, for the sale of its entire output; that Vancouver Kraft Company, Ltd. did not own a power site capable of developing 2900 horsepower, and has not, and did not intend to erect a hydro-electric plant capable of producing 2900 horsepower, and did not erect any hydro-electric plant whatever for use in connection with its property; that Vancouver Kraft Company, Ltd., never did complete its kraft paper mill, and did not install the machinery therein, and was not in a position to carry out any contracts for the sale of its output, even though it had contracts for the sale of the same. That the said Columbia River Paper Mills and Bates Valve Bag Corporation had not subscribed for sufficient preference 7% cumulative stock of the Vancouver Kraft Company, Ltd., to require them to pay upon call to the said Vancouver Kraft Company, Ltd., the sum of $400,000.00, or any sum whatsoever, and that the said Vancouver Kraft Company, Ltd., did not have funds enough to complete the construction of its said plant and operate the same, and that the said plant at the present date is incompleted, is not in operation, and never has been in operation.

V

That, relying upon said representations and believing [fol. 33] them to be true, and without any knowledge as to the falsity thereof, the purchaser purchased bonds of said issue of the par value of $2,000.00, and paid therefor the par value thereof. That, if said representations had not

been made to said purchaser, and if said purchaser had known that this was a mere promotion scheme and that the said mill, at the time of its acquisition by the defendants, was not in any sense a going concern, said purchaser would not have bought the bonds.

VI

That, had the representations been true, the bonds so purchased would have been worth the par value thereof. That, by reason of the falsity of said representations, the said bonds are secured by an incompleted saw mill and paper plant, which was never in operation, and for which, if the same were sold at a foreclosure sale, little, if anything, would be realized. That, by reason of the fact that it never operated, and by reason of the premises, the said bonds have no value whatsoever in excess of $10.00 per $1,000.00 of face value. That by reason of the premises and by reason of the said misrepresentations, the said purchaser was damaged in the sum of $1,980.00, no part of which sum has been paid.

VII

That said defendants paid or caused to be paid the installment of principal and interest due upon said bonds November 15, 1930, thus causing bondholders to feel that the representations above referred to were true and that said Vancouver Kraft Company, Ltd., was a going concern and was earning from the operation of its plant the necessary funds to meet payments due under said bonds. That the interest payment due May 15, 1931, was allowed to default, and upon such default said purchaser, together with other bondholders, commenced investigations which finally led to the discovery of the misrepresentations aforesaid. That said purchaser did not and could not by reasonable diligence have discovered the falsity of said representations prior to that time.

VIII

That prior to the commencement of this suit the above named purchaser transferred in writing to plaintiff all right, title and interest in and to all demands, claims or action which said purchaser has or had against the above named defendants by reason of the fraud perpetrated as above set forth.

[fol. 34] IN SUPREME COURT OF WASHINGTON

En Banc

No. 24002

THE STATE OF WASHINGTON on the Relation of BOND & GOODWIN & TUCKER, Incorporated, a Dissolved Delaware Corporation, Relator,

v.

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SPOKANE COUNTY and Honorable Joseph B. Lindsley, Judge Thereof, Respondents

OPINION—Filed Oct. 13, 1932

This is an application for a writ of prohibition directed to the superior court of Spokane county.

The relator, Bond & Goodwin & Tucker, was a corporation organized under the laws of Delaware. About the year 1926, it qualified with the laws of this state relating to foreign corporations that desired to do business here. It opened an office in the city of Spokane, and appointed a statutory agent. On or about November 29, 1929, the corporation ceased to transact business in this state, and withdrew therefrom. During the same year the statutory agent left this state and went to California, where he has since continuously resided.

W. A. Monroe commenced an action in the superior court of King county against the corporation, and on April 18, 1932, caused a copy of the summons and complaint to be left in the office of the secretary of state of this state. The summons and complaint were delivered to an assistant secretary of state, and were stamped "received" and filed. No notice of the receipt of the copy of the summons and [fol. 35] complaint and the filing thereof was sent by that officer to the corporation or any of its officers.

By a statute of the state of Delaware, it is provided that all corporations, whether they expire by their own limitation or are otherwise dissolved, may nevertheless be continued for the term of three years from such expiration or dissolution for the purpose of prosecuting or defending suits by or against them. The notice of dissolution of the

corporation was filed with the secretary of state of this state December 5, 1929. Section 3854, Rem. Comp. Stat., provides that, in case a foreign corporation shall revoke the authority of its designated agent after its withdrawal from the state and prior to the time the statutes of limitations shall run against causes of action accruing against it, "then in that event service of process, pleadings and papers in such actions may be made upon the secretary of state of the state of Washington, and the same shall be held as due and sufficient service upon such corporation." It will be noticed that in that provision for substituted service there is no requirement that the secretary of state shall forward notice to the corporation or to its officers. After the action was begun in the superior court, the corporation entered a special appearance and moved to quash the service; which motion was denied, and the corporation applied here for the writ, above indicated.

The first question is whether the superior court had jurisdiction by reason of the service upon the secretary of state, in view of the fact that the statute of this state did not require that officer to send notice to the corporation or its officers. In this connection, it is contended that the statute is unconstitutional under the Fourteenth Amendment to the [fol. 36] Constitution of the United States, which provides, among other things, that no state shall deprive any person of property "without due process of law." It is said that, in order to satisfy the requirement of the federal constitution, the statute should have provided that the secretary, after a copy of the summons and complaint were served upon him, should have sent notice to the corporation, the defendant in the action.

In Mutual Reserve Fund Life Assn. v. Phelps, 190 U. S. 147, a foreign corporation had gone into the state of Kentucky, complied with its laws, and afterwards ceased to do business therein because it was required to withdraw from the state. It was pointed out in the opinion that whether it voluntarily withdrew, or compulsorily, was immaterial. In that state, there was a statute which provided that, where a foreign corporation had come into the state, qualified with the laws thereof with reference to doing business, and had subsequently withdrawn, service of process could be had upon it by serving the state insurance commissioner. In that case, after referring to and quoting from the opin-

ion of the court of appeals of Kentucky sustaining the service and commenting thereon, it was said:

"As an original question, and independently of any expression on the part of the court of appeals, we are of the opinion that such is the true construction. This and other kindred statutes enacted in various states indicate the purpose of the state that foreign corporations engaging in business within its limits shall submit the controversies growing out of that business to its courts, and not compel a citizen having such a controversy to seek for the purpose of enforcing his claims the state in which the corporation has its home. Many of those statutes simply provided that the foreign corporation should name some person or persons upon whom service of process could be made. The insufficiency of such provision is evident, for the death or removal of the agent from the state leaves the corporation without any person upon whom process can be served. In order to remedy this defect some states, Kentucky among the number, have passed statutes, like the one before us, providing that the corporation shall consent that service may be made upon a permanent official of the state, so [fol. 37] that the death, removal or change of officer will not put the corporation beyond the reach of the process of the courts. It would obviously thwart this purpose if this association, having made, as the testimony shows it had made, a multitude of contracts with citizens of Kentucky, should be enabled, by simply withdrawing the authority it had given to the insurance commissioner, to compel all these parties to seek the courts of New York for the enforcement of their claims. It is true in this case the association did not voluntarily withdraw from the state, but was in effect by the state prevented from engaging in any new business."

It is true that there is no mention made in that opinion as to whether the state statute contained a provision for notice in the event of service upon a state officer, but the doctrine is plainly stated that the corporation, by complying with the laws of the state, consented to service upon an official of the state in accordance with the laws of that state.

In Wuchter v. Pizzutti, 276 U. S. 13, the court had before it a statute of the state of New Jersey, which provided that in actions by residents of that state against non-residents

for personal injuries resulting from the operation by the latter of a motor vehicle on the state highways, service of summons could be made on the secretary of state as their agent, and it was there held that jurisdiction could not be obtained under the statute by serving the state officer because there was no provision in the statute that the officer should give notice to the defendant. In that case, the non-resident operator of the automobile against whom the action was brought had not impliedly consented to be bound by the laws of the state of New Jersey, as is the case of a foreign corporation coming into a state to do business and qualifying with its laws. In the opinion in that case it was pointed out that statutes providing that non-resident corporations may properly be served by leaving summons with a state officer, where the corporation has not indicated a [fol. 38] resident agent to be served, were not particularly applicable to the situation then before the court. After reviewing a number of decisions from the state courts, the court concluded with the statement that the general trend of authority was toward sustaining the validity of service of process, provided there is a reasonable probability that, if the statute was complied with, the defendant would receive notice. It was there held that:

"The cases, in which statutes have been upheld providing that non-resident corporations may properly be served by leaving a summons with a state official, where the corporation has not indicated a resident agent to be served, are not especially applicable to the present statute. Pennsylvania Fire Insurance Co. v. Gold Issue Mining Co., 243 U. S. 93; Simon v. Southern Ry. Co., 236 U. S. 115; Old Wayne Mutual Life Association v. McDonough, 204 U. S. 8. Such corporations may properly be required to accept service through a public officer as a condition of their doing business in the state. Their knowledge of the statutory requirement may perhaps prompt frequent inquiry as to suits against them, of their appointed agent or at the office of the public official to be served, but it could hardly be fair or reasonable to require a non-resident individual owner of a motor vehicle who may use the state highways to make constant inquiry of the secretary of state to learn whether he has been sued. Even in cases of non-resident corporations, it has been held that a statute directing service upon them by leaving process with a state official is

void if it contains no provision requiring the official, upon whom the service may be made, to give the foreign corporations notice that suit has been brought and citation served. * * * These cases and others indicate a general trend of authority toward sustaining the validity of service of process, if the statutory provisions in themselves indicate that there is reasonable probability that if the statutes are complied with, the defendant will receive actual notice, and that is the principle that we think should apply here."

It will be seen that it is expressly pointed out in the opinion that "such corporations [foreign corporations] may properly be required to accept service through a public officer as a condition of their doing business in the state." Following this, it is pointed out that their knowledge of the statutory requirements may prompt frequent inquiry as to suits against them, by their appointed agent or at the office [fol. 39] of the public official to be served, but that it would hardly be fair and reasonable to require "a non-resident individual owner of a motor vehicle who may use the state highways to make constant inquiry of the secretary of state to learn whether he has been sued."

In Consolidated Flour Mills Co. v. Muegge, 278 U. S. 559, the court reversed, without an opinion, upon the authority of Wuchter v. Pizzutti, 276 U. S. 13, supra, a decision of the supreme court of Oklahoma sustaining the service upon a foreign corporation, which had done business in that state, by serving a state officer. In that case, however, as expressly pointed out in the decision of the supreme court of Oklahoma (Consolidated Flour Mills Co. v. Muegge, 127 Okla. 295), "the defendant had not obtained authority to do business in the state of Oklahoma and had not designated an agent upon whom service of process could be made." It had not therefore consented to be bound by the laws of that state with reference to the service of process. The statute of Oklahoma did not provide for notice by the officer to the corporation.

There appears to us to be a clear distinction between a foreign corporation which goes into a state, complies with the laws thereof, and thereby consents to be bound by such laws, and an individual who merely passes through a state in an automobile or a corporation which has done business in the state without compliance with these laws and without

consenting to be bound thereby. This distinction is recognized in Penna. Fire Ins. Co. v. Gold Issue Mining Co., 243 U. S. 93, where, after referring to certain cases, it is said:

"In the above mentioned suits the corporations had been doing business in certain states without authority. They had not appointed the agent as required by statute, and it [fol. 40] was held that service upon the agent whom they should have appointed was ineffective in suits upon causes of action arising in other states. The case of service upon an agent voluntarily appointed was left untouched. 236 U. S. 129, 130. If the business out of which the action arose had been local it was admitted that the service would have been good, and it was said that the corporation would be presumed to have assented."

This same distinction is recognized in the case of Wuchter v. Pizzutti, 276 U. S. 13, supra, where it is pointed out that foreign corporations may properly be required to accept service through a public officer as a condition of their doing business in the state. It is true that as a general rule a foreign corporation, by seeking and obtaining permission to do business in a state, does not thereby become obligated to comply with or estopped from objecting to any provision of the state statutes which may be in conflict with the constitution of the United States. Hanover Fire Ins. Co. v. Carr, 272 U. S. 494; Power Mfg. Co. v. Saunders, 274 U. S. 490. But before that rule would become applicable, it must definitely appear that the state statute impinges upon the federal constitution.

The question of whether the statute of this state under which service of process was made in this case provides for due process of law presents primarily a federal question. As we understand the decisions of the supreme court of the United States, it has not yet been definitely determined that a statute, such as the one now before us, is obnoxious to the Fourteenth Amendment to the federal constitution. It will be admitted that the question is by no means free from doubt, but we think that the doubt by this court should be resolved in favor of sustaining the jurisdiction of the superior court. If we are in error in this, after the case has been tried upon

the merits and there is another appeal, the question can [fol. 41] then be considered again, and that error can be corrected by the federal supreme court, which is the court of last resort and highest authority. On the other hand, if we should deny the jurisdiction and be in error, an injustice would be done which could not later be corrected.

The next question is whether the statute denies to the relator, the corporation, the equal protection of the laws. In the Fourteenth Amendment to the federal constitution it is provided that no state shall make or enforce any law which "shall abridge the privileges or immunities of citizens of the United States". It is said that the law now before us discriminates against a foreign corporation in the manner of service as against a domestic corporation or an insurance company, because, with reference to those, the statutes (Rem. Comp. Stat. §227 and §7040) provide that, when service cannot be obtained upon a corporation, process may be served upon the secretary of state and he is required to give notice thereof. In Power Mfg. Co. v. Saunders, 274 U. S. 490, it is pointed out that there may be subjects as to which foreign corporations may be differently classified from domestic. This question, like the one previously considered, is in the doubtful zone, and, for the reasons already indicated, we think that doubt should be resolved at the present time in favor of sustaining the statute.

There is the further contention that the service upon the assistant secretary of state was not sufficient, and that, to be effective, it was necessary that it be served upon the secretary of state. While the statute says "secretary of state", it would be hypertechnical to hold that service upon [fol. 42] an assistant secretary did not comply with the statute.

The writ will be denied, with leave to present the questions again after an appeal from the judgment upon the merits, if there is such an appeal.

Main, J.

We concur:

Tolman, C. J.; Herman, J.; Beals, J.; Mitchell, J.; Millard, J.

[fol. 43] IN SUPREME COURT OF WASHINGTON

No. 24002

DISSENTING OPINION

HOLCOMB, J., dissenting:

The service of summons and complaint on Bond & Goodwin & Tucker, Inc., was attempted to be made under the provisions of Rem. Comp. Stat., §3854, relating to foreign or non-resident corporations, which, after prescribing how such corporations shall constitute and appoint agents, change them from time to time, and file notice of such appointments in the office of the secretary of state, in part, reads:

"In case said corporation shall revoke the authority of its designated agent after its withdrawal from this state and prior to the time when the statutes of limitations would have run against causes of action accruing against it, then in that event service of process, pleadings and papers in such actions may be made upon the secretary of state of the state of Washington, and the same shall be held as due and sufficient service upon such corporation."

The objection of relator to the service attempted under the statutory provisions above quoted, is that it would deprive relator of its property without due process of law and in violation of clause one of the fourteenth amendment to the United States constitution and is therefore void.

It must first be noted that our statute providing for service upon nonresident corporation makes no provision for notice by the secretary of state to the corporation, or the delivery of a copy of the process by him to such corporation.

Wuchter v. Pizzutti, 276 U. S. 13, involved a statute of New Jersey, which provided that in actions by residents of that state against nonresidents for personal injuries resulting from the operation by the latter of their motor vehicles on the state highways, service of summons might be made on the secretary of state, as their agent, which contained no further provision making it reasonably probable that notice of such service would be communicated to the defendants, held that the statute was lacking in due process of law, reversing the state court, 103 N. J. L., 130. A valid

[fol. 44] reason would have been the fact that in such personal injury cases there would be little likelihood, unless notice by the secretary of state was required, such transient, nonresident defendants would receive any notice and judgments could be obtained against responsible nonresident defendants without notice, thus taking property without due, or any process, and in violation of the Federal Constitution.

A case decided by the supreme court of Virginia, Du Pont Engineering Co. v. John P. Harvey Const. Co., — Va. —, 158 S. E. 891, decided some three years after the decision in the Wuchter case, supra, seemed logical in reasoning and in result, sustaining substituted service on a state officer.

Examination discloses, however, that the Du Pont case, which did not fully set out the provisions of the Virginia statute, followed an earlier case by the same court, American Ry. Express Co. v. Fleishman, Morris & Co., — Va. —, 141 S. E. 253, which did. The statutes of Virginia there set out were §3845 and §3846, Code of 1919, the first section of which had similar provisions to the first provisions of our §3854, supra, relating to foreign corporations; and the second section provided that whenever lawful process against, or notice to, any such company or society should be served as provided in the preceding section, the secretary of the commonwealth should forthwith mail a copy of such process or notice to the company or society, etc.

It is thus seen that the Virginia statute contained a provision for notice to be forwarded by the secretary of the commonwealth to the nonresident corporation, which the New Jersey statute did not prescribe as to nonresident defendants, whether private or corporate.

In another case, The Consolidated Flour Mills Co. v. Muegge, et al., 278 U. S. 559, that court reversed a decision [fol. 45] by the supreme court of Oklahoma, merely saying: "Reversed on the authority of Wuchter v. Pizzutti, 276 U. S. 13."

It is necessary, therefore, to turn to the decision of the supreme court of Oklahoma in the last cited case to determine what statute was there interpreted, which that court decided was not in contravention of the fourteenth amendment or due process clause of the Federal constitution. (260 Pac. 745). That court, cited as a case in point, Kaw

Boiler Works v. Frymyer, 227 Pac. 453. In the last citation the statute of Oklahoma, relating to service on foreign corporations doing business in Oklahoma and which had failed to appoint an agent, was quoted, which provided:

"Service of summons or any process upon the secretary of state shall be sufficient to give jurisdiction of the person to any court in this state having jurisdiction of the subject matter."

In these two cases the Oklahoma court reviewed a large number of cases, both state and Federal, bearing upon the question and held their statute would not contravene the Federal constitution. The supreme court, as is seen by the decision in 278 U. S., held that the statute did violate the provisions of the Federal constitution relating to due process and therefore reversed it.

It is to be observed that our insurance code, Rem. Comp. Stat., §7044, when providing for service against foreign insurance companies, requires duplicate copies to be served upon the state commissioner of insurance and upon such service being made, the commissioner shall forthwith mail one of such duplicate copies to the company at its home office or general agency, or in case of an alien company, to the resident manager, if any, in this country.

If §3854, supra, providing for service on a nonresident, or a withdrawing corporation, contained similar provisions, doubtless it would be valid under the Wuehter and Muegge decisions. But it has no such provision.

[Fols. 46 & 46½] As to its right to question such state laws as objectionable to provisions of the Federal constitution, after seeking and obtaining permission to do business in a state by a foreign corporation, see Powers Mfg. Co. v. Saunders, 274 U. S. 490, and cases cited, allowing such right.

This being the sole question to determine in this proceeding, as we are bound by the decisions of the supreme court of the United States respecting the law applicable, under these later decisions, I am forced to conclude that the writ should be granted.

For the foregoing reasons I dissent.

Holcomb, J.

I concur with Holcomb, J.

Steinert, J.; Parker, J.

[fols. 46-1 & 46-3] IN SUPREME COURT OF WASHINGTON

No. 24002

[Title omitted]

RELATOR'S PETITION FOR REHEARING

The Relator in the above entitled cause respectfully petitions the court for a rehearing thereof, upon the following grounds:

[fol. 46-4] I

This case admittedly involves Federal questions of "due process" and "equal protection of the laws"—which questions are necessarily to be determined in the light of the decisions of the Supreme Court of the United States. The majority opinion of this court, as filed, recognizes that the instant case is controlled and settled by the principles announced in the decisions in Consolidated Flour Mills vs. Muegge, 278 U. S. 559, and Wuchter vs. Pizzutti, 276 U. S. 13, unless these decisions can be distinguished.

The sole ground of distinction for avoiding the application of the Wuchter and Muegge cases is, as stated on page 6 of the majority opinion, that "the defendant (in the Muegge case) had not obtained authority to do business in the State of Oklahoma and had not designated an agent upon whom service of process could be made," whereas in the instant case the Relator did originally designate an [fol. 46-5] agent (to-wit, Duncan Shaw, but not at any time the Secretary of State) upon whom service of process might be made. Upon the sole basis of this suggested distinction the majority opinion concludes that the Relator therefore consented to be bound by the laws of Washington with reference to service of process upon the Secretary of State.

This conclusion is directly contrary to the principle of other decisions of the Supreme Court of the United States to the effect that a foreign corporation, by seeking and obtaining permission to do business in a state, does not thereby become obligated to comply with, or estopped from objecting to, any provision of a state statute which is in conflict with the Constitution of the United States. Upon page 7

of the majority opinion this immediately foregoing principle of constitutional law is expressly recognized, but followed by this illogical comment: "But before that rule [fol. 46-6] would become applicable it must definitely appear that the state statute impinges upon the Federal Constitution." This comment merely puts the matter back again to the original question, to-wit, whether "the Washington state statute does inpinge upon the Federal Constitution," which is the exact question decided by the Pizzutti and Muegge cases. In other words, the attempted distinction on the facts as between the Muegge case and the instant case immediately forces a recognition of another principle of constitutional law, to-wit, that under the facts there is no waiver of Relator's constitutional rights and therefore no distinction at all. This leaves the original question still the sole question for decision and the argument has merely proceeded in a circle.

Therefore, having got back to the original question, what principle in the Pizzutti case was relied upon for purposes of the Muegge per curiam decision? Clearly the following principle announced in the Pizzutti case, to-wit:

[fol. 46-7] "In the cases of non-resident corporations it has been held that a statute directing service upon them by leaving process with a state official is void if it contains no provision requiring the official upon whom service is made to give the foreign corporation notice that suit has been brought and citation served."

This quotation is directly in point in the instant case and it was upon the basis of this view, as categorically expressed in the Pizzutti case, that the Supreme Court in the Muegge case reversed the State Supreme Court of Oklahoma, and this language as exactly fits the Washington statute as it did the Oklahoma statute.

In view of the foregoing considerations appearing on the face of the majority opinion, we respectfully submit that a rehearing should be granted.

II

The majority opinion also discloses that substantial reliance is had upon certain language appearing in the earlier [fol. 46-8] case of Mutual Reserve Fund Life Ins. Co. vs.

Phelps, 190 U. S. 157. We respectfully submit and earnestly believe that if a rehearing is granted it will clearly appear to this Honorable Court that in that case and similar cases the state statutes under consideration definitely contained the very provision that is wholly absent from the Washington statute and is the basis of the Muegge decision, namely, the provision for notice requiring the official upon whom the service is made to give the foreign corporation notice that suit has been brought and citation served. The instant case ought not to go to the Supreme Court of the United States under any such misapprehension by this court of the nature of the statute before the Supreme Court in the Mutual Reserve Fund Life Ins. Co. case.

III

Apart from any matter of "due process," there is the question of "the equal protection of the laws" likewise [fol. 46-9] guaranteed by the Fourteenth Amendment to the Constitution of the United States. The majority opinion disposes of this question by merely saying that it is in the "doubtful zone." We respectfully submit that a constitutional question of this importance ought not to be indecisively dismissed and that a rehearing and reargument should be granted so that the matter may be more fully examined in the light of the decisions of the Supreme Court of the United States upon this question.

IV

Bound up with the foregoing considerations is the question of the validity of service made upon the assistant Secretary of State instead of upon the Secretary of State, as the statute expressly requires. This question is dismissed by the majority opinion as "hypertechnical" and without reference to the serious constitutional implications which the question raises. "Due process" under the Federal Constitution always means exact compliance with service stat- [fol. 46-10] utes. No alleged constructive consent to service of process upon a specifically designated state officer can possibly extend to service upon another or subordinate state officer. We respectfully submit that this question also should be further examined upon a rehearing and a reargument.

In this connection we beg to add that a point can hardly be treated as hypertechnical which has been previously considered and decided favorably to the Relator, not only in a former decision of this court, but in decisions by other State Courts and Federal Courts and by the Supreme Court of the United States.

Bennett vs. Maccabees, 40 Wash. 431.

Lonkey vs. Keyes Silver Mining Co. (Nev.), 31 Pac. 57 (specifically approved in the Bennett case, supra).

City of Watertown vs. Robinson, 69 Wis. 233, 34 N. W. 139.

Amy vs. Watertown, 130 U. S. 301, 32 L. ed. 946.

[fol. 46-11] In the Watertown case, supra, the Supreme Court of Wisconsin used the following language, which was afterwards approved and adopted by the Supreme Court of the United States in Amy vs. Watertown, 130 U. S. 301, 317:

"When the statute prescribes a particular mode of service, that mode must be followed. Ita lex scripta est. There is no chance to speculate whether some other mode will not answer as well. This has been too often held by this court to require further citations. * * * When the statute designates a particular officer to whom the process may be delivered, and with whom it may be left, as service upon the corporation, no other officer or person can be substituted in his place. * * * The designation of one particular officer upon whom service may be made excludes all others."

V

The concluding paragraph of the majority opinion reads as follows:

"The writ will be denied, with leave to present the questions again after an appeal from the judgment upon the [fol. 46-12] merits, if there is such an appeal."

The judicial effect of the foregoing language is uncertain and leaves grave doubt as to whether the court has effectually decided any of the constitutional questions here involved. This doubt is emphasized in the body of the opinion where, after stating that the question of the "equal pro-

tection of the laws" is in the "doubtful zone," the writer of the opinion adds the following:

"* * * we think that doubt should be resolved at the present time in favor of sustaining the statute."

The phrase "at the present time" is extremely confusing and uncertain in its judicial effect.

The foregoing disposition of the constitutional questions cannot be other than unsatisfactory to all parties concerned. Doubt and uncertainty regarding the jurisdictional question will overshadow the proceedings in the trial court, or, if a direct appeal is now taken to the Supreme Court of the [fol. 46-13] United States without the Supreme Court of Washington being definitely committed, either to the constitutionality or the unconstitutionality of the Washington statute, may not the Supreme Court of the United States say that this is not a final decision but merely an expression of views on the part of the Supreme Court of the State of Washington, with leave to the Relator to raise the matters later upon appeal from the trial court?

We respectfully submit that all parties to this case are entitled to a definite decision by this Honorable Court and that a rehearing and a reargument should be granted so that the doubts appearing on the face of the present majority opinion may be definitely resolved.

VI

The Relator's application for a writ of prohibition restraining the Superior Court of Spokane County from exer- [fol. 46-14] cising jurisdiction over the Relator as a defendant in the cause of Monroe vs. Vancouver Kraft, et al., now pending in said Superior Court, is an independent proceeding in which the Relator relies upon its rights under the Constitution of the United States; the judgment of this court in this proceeding is subject to direct review by the Supreme Court of the United States on a writ of error (now appeal).

Mount Vernon Woodberry Cotton Duck Co. vs. Alabama Interstate Power Co., 240 U. S. 30, 60 L. ed. 507.

Missouri vs. Taylor, 266 U. S. 200, 69 L. ed. 247.

Bandini Petroleum Co. vs. Court, 284 U. S. 8, 76 L. ed. (Adv. Op.) 123.

VII

The majority opinion filed October 13, 1932, erroneously recites on page 1 thereof that "W. A. Monroe commenced an action in the Superior Court of King County," whereas [fol. 46-15] in truth and in fact said action was begun in the Superior Court of Spokane County. Since this case may go to the Supreme Court of the United States we deem it our duty to call this error to the Court's attention.

In the same connection, we call attention to the error in the recital in the last paragraph on page 2 of said opinion where it is indicated that service was made "upon the Secretary of State," whereas in truth and in fact said service was made on the Assistant Secretary of State.

Dated this 10th day of November, 1932.

Respectfully submitted.

Todd, Holman & Sprague and Eugene C. Luccock, Attorneys for Relator.

[fol. 47] In Supreme Court of Washington

No. 24002

[Title omitted]

Order Denying Petition for Rehearing—Filed Dec. 2, 1932

The court having considered the relator's petition for rehearing and having today filed a per curiam opinion amending certain language in its opinion heretofore filed herein;

It is ordered, in accordance with the per curiam opinion that the petition be in all other respects denied.

Dated this 2 day of December, 1932.

By the Court.

Tolman, Chief Justice.

Todd, Holman & Sprague, Eugene C. Luccock, Kimball & Blake, Wakefield & W., Herbert W. Erskine.

[File endorsement omitted.]

[fol. 48] IN SUPREME COURT OF WASHINGTON

No. 24002

En Banc

THE STATE OF WASHINGTON on the Relation of BOND & GOODWIN & TUCKER, Incorporated, a Dissolved Delaware Corporation, Relator,

v.

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SPOKANE County and Honorable Joseph B. Lindsley, Judge Thereof, Respondents

OPINION ON PETITION FOR REHEARING—Filed Dec. 2, 1932

Per CURIAM:

Since the opinion in this case was filed, a petition for rehearing has been presented, in which it is said that, by reason of certain language in the body of the opinion and the concluding sentence, a doubt has arisen, or may arise, as to whether this court has rendered a final decision in the case. To the end that this doubt may be removed, one sentence in the body of the opinion, to which attention is called, and the concluding sentence will be changed in order that it may be definitely understood that this court has rendered a final decision in the cause.

The sentence in the body of the opinion, reading as follows:

"This question, like the one previously considered, is in the doubtful zone, and, for the reasons already indicated, we think that doubt should be resolved at the present time in favor of sustaining the statute,"

will be amended to read as follows:

"This question, like the one previously considered, is in the doubtful zone, and, for the reasons already indicated, we think that doubt should be resolved in favor of sustaining the statute."

[fol. 49] The concluding sentence of the opinion, which reads as follows:

"The writ will be denied, with leave to present the questions again after an appeal, from the judgment upon the merits, if there is such an appeal,"

will be amended to read as follows:

"The writ will be denied."

With the concluding sentence as thus amended, the original opinion will say, as we here now say without qualification, that the writ is denied. In all other respects, the petition for rehearing will be denied.

[fol. 50] IN SUPREME COURT OF WASHINGTON

No. 24002

STATE ex Rel. BOND & GOODWIN & TUCKER, INCORPORATED, Realtor,

v.

SUPERIOR COURT OF SPOKANE COUNTY, Respondent

JUDGMENT—Dec. 2, 1932

This cause having been heretofore submitted to the court upon the petition of the relator for a writ of prohibition to restrain the respondent from taking any further proceedings in the case of W. A. Monroe vs. Vancouver Kraft Co. and these relators and others, and the court having filed its opinion in writing, it is ordered and adjudged that the petition be and the same is denied and that the said W. A. Monroe have and recover of and from the said Bond & Goodwin & Tucker, Incorporated the costs of this action taxed and allowed at Sixteen and 00/100 Dollars and that execution issue therefor. And it is further ordered that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

[fol. 51] IN SUPREME COURT OF WASHINGTON

No. 24002

[Title omitted]

ORDER RECALLING REMITTITUR, ETC.—Filed Dec. 6, 1932

Ordered that the remittitur in the above entitled cause be recalled and that proceedings in the Superior Court therein be stayed for a period of thirty (30) days in order that an appeal to the United States Supreme Court may be initiated.

December 6, 1932.

Warren W. Tolman, Chief Justice.

[File endorsement omitted.]

[fol. 52] [File endorsement omitted]

No. 24002

[Title omitted]

Petition for Appeal, Assignment of Errors and Prayer for Reversal—Filed Dec. 29, 1932

PETITION FOR APPEAL

Your petitioner, the appellant above named, to-wit: Bond & Goodwin & Tucker, Incorporated, a dissolved Delaware corporation, hereby respectfully sets forth that on the 2nd day of December, 1932, the Supreme Court of the State of Washington, sitting at Olympia, Washington, made and entered a final order and judgment in favor of the above named appellees and against your petitioner, which order and judgment denied the application of the petitioner for a writ of prohibition restraining the appellees from taking any further proceedings in a certain cause pending in the aforesaid Superior Court of the State of Washington for Spokane County entitled: W. A. Monroe, Plaintiff, v. Vancouver Kraft Company, Ltd., a corporation, and the petitioner and others, Defendants. That said Supreme Court

[fol. 53] of the State of Washington is the highest court of the said State of Washington in which a decision in said matter can be had.

Considering itself aggrieved by the said final order and judgment of the said Supreme Court of the State of Washington, the said Bond & Goodwin & Tucker, Incorporated, a dissolved Delaware corporation, hereby prays that an appeal be allowed to the Supreme Court of the United States herein and for an order fixing the amount of the bond thereon.

Assignment of Errors

The said Bond & Goodwin & Tucker, Incorporated, a dissolved Delaware corporation, assigns the following errors in the record and proceedings in the said case:

I

The Supreme Court of the State of Washington erred in holding that the provisions of Section 3854 of Rem. Comp. Stats. of Washington, 1922, under which service of summons and complaint upon the appellant, Bond & Goodwin & Tucker, Incorporated was attempted by leaving one copy of said summons and complaint in the office of the Secretary of State of the State of Washington, are not repugnant to and are not in conflict with and are not in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that the particular provisions of said Section 3854 regarding service of process upon a foreign corporation where such corporation has withdrawn from the State do not require the Secretary of State or the plaintiff in the action to give said corporation any notice of such service of process or any copy of the summons or complaint or in any other way to give such corporation any notice or information as to the nature and [fol. 54] character of the action so as to enable such corporation to make a defense thereto and the State of Washington, by and through said Section 3854, assumes and seeks to deprive the appellant of its property without due process of law.

II

The Supreme Court of the State of Washington erred in holding that the provisions of Section 3854 of Rem.

Comp. Stats. of Washington, 1922, under which service of summons and complaint upon the appellant Bond & Goodwin & Tucker, Incorporated was attempted by leaving one copy of said summons and complaint in the office of the Secretary of State of the State of Washington, are not repugnant to and are not in conflict with and are not in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that the particular provisions of said Section 3854 regarding service of process upon a foreign corporation, where such corporation has withdrawn from the State, are less favorable than similar provisions regarding service of process contained in Section 227 of Rem. Comp. Stats. of Washington, 1922, as to service on domestic corporations where no officer or agent of such corporation can be found in the State, and are less favorable than similar provisions regarding service of process contained in Section 7044 of Rem. Comp. Stats. of Washington, 1922, as to service of process on foreign insurance companies, and the State of Washington, by and through said Section 3854, assumes and seeks to deny to the appellant the equal protection of its laws.

III

The Supreme Court of the State of Washington erred in holding that under the provisions of Section 3854 of Rem. [fol. 55] Comp. Stats. of Washington, 1922, jurisdiction over the person of the appellant, Bond & Goodwin & Tucker, Incorporated, was acquired by the Superior Court of the State of Washington for Spokane County in the case of W. A. Monroe, Plaintiff, v. Vancouver Kraft Company, Ltd., appellant and others, Defendants, pending in said court, by leaving one copy of the summons and complaint in said action with the Assistant Secretary of State of the State of Washington in that said Section 3854 does not provide for service of process upon a foreign corporation, after it has withdrawn from the State, by leaving a copy of summons and complaint with the Assistant Secretary of State of the State of Washington and does not require the Assistant Secretary of State or the plaintiff in the action to give said corporation any notice of such service or any copy of the summons or complaint or in any other way to give such corporation any notice or information as to the nature and character of the action so as to enable such cor-

poration to make a defense thereto and by and through such attempted service of process the State of Washington assumes and seeks to deprive the appellant of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

IV

The Supreme Court of the State of Washington erred in holding that jurisdiction over the person of the appellant, Bond & Goodwin & Tucker, Incorporated, was acquired by the Superior Court of the State of Washington for Spokane County in the case of W. A. Monroe, Plaintiff, v. Vancouver Kraft Company, Ltd., appellant, and others, Defendants, pending in said court, by leaving one copy of the summons and complaint in said action with the Assistant Secretary of State of the State of Washington in that under the provisions of Section 3854, of Rem. Comp. Stats. of [fol. 56] Washington, 1922, there is no provision for service of process upon the Assistant Secretary of State and by such service of process the State of Washington assumes and seeks to deprive appellant of its property without due process of law, contrary to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

V

The Supreme Court of the State of Washington erred in holding that the Superior Court of the State of Washington for Spokane County acquired jurisdiction over the person of the appellant, Bond & Goodwin & Tucker, Incorporated, in the case of W. A. Monroe, Plaintiff, v. Vancouver Kraft Company, Ltd. and Bond & Goodwin & Tucker, Incorporated and others, Defendants, in that the attempted service of process upon the appellant, Bond & Goodwin & Tucker, Incorporated, personally, within the State of Washington after it had withdrawn from said State, by leaving a copy of the summons and complaint with the Secretary or Assistant Secretary of State of the State of Washington, in the manner provided by Section 3854 of Rem. Comp. Stats. of Washington, 1922, is repugnant to and in conflict with and in violation of Section 1 of the Fourteenth

Amendment to the Constitution of the United States and thereby the State of Washington assumes and seeks to deprive the appellant of its property without due process of law and to deny to appellant the equal protection of its laws.

VI

The Supreme Court of the State of Washington erred in denying to the appellant a permanent writ of prohibition enjoining and restraining the Superior Court of the State of Washington for Spokane County from proceeding with [fols. 57–63] the trial of the cause pending before it entitled W. A. Monroe, Plaintiff, v. Vancouver Kraft Company, Ltd., and Bond & Goodwin & Tucker, Incorporated, and others, defendants, as against the appellant and from exercising any jurisdiction therein over the appellant in that the attempted service of process upon the appellant by leaving a copy of the summons and complaint with the Secretary or Assistant Secretary of State of the State of Washington in the manner provided by Section 3854 of Rem. Comp. Stats. of Washington, 1922, under which attempted service of process said Superior Court claims to have acquired such jurisdiction, was and is repugnant to and in conflict with and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and thereby the State of Washington assumes and seeks to deprive the appellant of its property without due process of law and to deny to appellant the equal protection of its laws.

Prayer for Reversal

For which errors appellant prays that the said judgment of the Supreme Court of the State of Washington, dated December 2, 1932, in the above entitled cause, be reversed and a judgment entered in favor of the said appellant, and for costs.

Elmer E. Todd, Frank E. Holman, Counsel for Appellant.

[fol. 64] [File endorsement omitted]

SUPREME COURT OF THE UNITED STATES

No. 24002

[Title omitted]

ORDER ALLOWING APPEAL—Filed Dec. 29, 1932

The appellant in the above entitled suit, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled suit by the Supreme Court of the State of Washington on the 2nd day of December, 1932, and from each and every part thereof, and having presented and filed its petition for appeal, assignment of errors, prayer for reversal and statement as to jurisdiction, pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided,

It is now here ordered that an appeal be and the same is hereby allowed to the Supreme Court of the United States from the Supreme Court of the State of Washington in the above entitled cause, as provided by law, and

[fol. 65] It is further ordered that the Clerk of the Supreme Court of the State of Washington shall prepare and certify a transcript of the record, proceedings and judgment in this cause, in accordance with Rule 10 of the Revised Rules of the Supreme Court of the United States, and transmit the same to the Supreme Court of the United States so that he shall have the same in said court within sixty (60) days of this date.

And it is further ordered that security for costs on appeal be fixed in the sum of one thousand dollars ($1,000.00).

Dated this 29th day of December, 1932.

Warren W. Tolman, Chief Justice of the Supreme Court of the State of Washington.

[fols. 66 & 67] Bond on appeal for $1,000, approved and filed January 3, 1933, omitted in printing.

[fols. 68–71] Citation, in usual form, showing service on Joseph B. Lindsley, filed January 3, 1933, omitted in printing.

[fol. 72] IN SUPREME COURT OF WASHINGTON

No. 24002

[Title omitted]

ORDER DIRECTING FILING OF RETURN TO ALTERNATIVE WRIT OF PROHIBITION AS OF JULY 1, 1932

Whereas, on July 1st, 1932, in open court, at the time the above entitled cause was called for argument before the court sitting en banc, counsel for the Respondents in said cause asked and obtained leave to file Respondents' return to alternative writ of prohibition, counsel for the Relator not objecting thereto, and

Whereas, the said return to alternative writ of prohibition was at said time submitted to the court as part of the records in said cause, but through inadvertence said return to alternative writ of prohibition was not in fact filed in the clerk's office or incorporated with the records and files in said cause; now, therefore, upon consideration thereof,

It is ordered that the aforesaid return to alternative writ of prohibition be filed with the clerk of this court in the above entitled cause as of July 1st, 1932.

Dated this 9th day of January, 1933.

Walter B. Beals, Chief Justice.

[fol. 73] [File endorsement omitted]

SUPREME COURT OF THE UNITED STATES

No. 24002

[Title omitted]

PRÆCIPE FOR RECORD ON APPEAL—Filed Jan. 3, 1933

To the Honorable C. S. Reinhart, Clerk of the Supreme Court of the State of Washington:

You will please make and transmit to the Supreme Court of the United States, under your hand and seal of the Supreme Court of Washington, in the manner and in the time required by the statutes of the United States, the rules of the Supreme Court of the United States and the Order allowing an appeal in the above entitled cause, a

true copy of the material parts of the record in the above entitled cause, including therein the following documents and papers, to-wit:

1. Affidavit and application for writ of prohibition (including the copies of the following documents attached thereto as exhibits):

(a) Summons in case of Monroe v. Vancouver Kraft.

(b) Sheriff's return in the case of Monroe v. Vancouver Kraft.

(c) Special appearance and motion in case of Monroe v. Vancouver Kraft, which in turn includes copies of affidavit of Donald Y. Lamont, Certificate of Dissolution, Affidavit of Benton G. Wood, Affidavit of J. Grant Hinkle; affidavit of Clark Erwin; and affidavit of Parker W. Kimball; also order denying motion to quash; also special application for stay of proceedings; including certificate to the foregoing.

[fol. 74] 2. Order to Show Cause and alternative writ of prohibition.

3. Demurrer to application for writ of prohibition.

4. Return to alternative writ of prohibition (Including Exhibit A thereto attached).

5. Opinion filed October 13, 1932.

6. Relator's petition for a rehearing.

7. Order denying petition for rehearing dated Dec. 2, 1932.

8. Opinion filed December 2, 1932.

9. Judgment entered Dec. 2, 1932.

10. Order dated December 6, 1932, recalling remittitur.

11. Petition for allowance of appeal, assignments of error and prayer for reversal.

12. Statement as to jurisdiction of the Supreme Court of the United States.

13. Order allowing appeal and fixing bond.

14. Bond.

15. Citation, with proof of service.

16. Notice directing attention to Rule 12 of United States Supreme Court and proof of service, including service of copy of petition and order allowing appeal, copy of assignments of error and copy of statement as to jurisdiction.

17. Order authorizing filing nunc pro tunc of return to alternative writ of prohibition.

18. Præcipe for record and proof of service.
Elmer E. Todd, Frank E. Holman, Counsel for Applant.

Service of the foregoing Præcipe and receipt of copy thereof acknowledged this 20th day of Dec., 1932.
Parker W. Kimball, Wakefield & Witherspoon, Counsel for Appellees. Herbert W. Erskine.

[fol. 75] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 76] SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed Feb. 3, 1933

Comes now the appellant and adopts its assignments of error as its statement of the points to be relied upon and represents that the whole of the record, as filed, is necessary for the consideration of the case.
Elmer E. Todd, Frank E. Holman, Counsel for Appellant.

Service of the foregoing statement and designation acknowledged this 27th day of January, 1933.
Parker W. Kimball, Wakefield & Witherspoon, Herbert W. Erskine, Counsel for Appellees.

Address: 1117 Old National Bank Bldg., Spokane, Washington.

[fol. 77] [File endorsement omitted.]

Endorsed on cover: File No. 37,360. Washington Supreme Court. Term No. 663. The State of Washington on the relation of Bond & Goodwin & Tucker, Incorporated, a dissolved Delaware corporation, appellant, vs. Superior Court of the State of Washington for Spokane County and Honorable Joseph B. Lindsley, judge thereof. Filed February 3, 1933. File No. 37,360.

FILED

IN THE

THE STATE OF WASHINGTON, on the Relation of REED & GOODWIN & FISHER, INCORPORATED, a Domestic Logging Corporation, Appellant,

vs.

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SPOKANE COUNTY and HON. JOSEPH B. LINDSLEY, Judge Thereof,

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APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON.

STATEMENT AS TO JURISDICTION.

ELMER E. TODD,
FRANK H. HOLMAN,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 663

THE STATE OF WASHINGTON ON THE RELATION OF BOND & GOODWIN & TUCKER, INCORPORATED, A DISSOLVED DELAWARE CORPORATION, APPELLANT,

vs.

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SPOKANE COUNTY AND HON. JOSEPH B. LINDSLEY, JUDGE THEREOF.

STATEMENT AS TO JURISDICTION.

The appellant, in support of the judisdiction of the Supreme Court of the United States to review the above entitled cause on appeal, respectfully represents:

A.

Statutory Provision Sustaining Jurisdiction.

The Act of February 13, 1925, ch. 229, Section 1, 43 Stat. 937 (U. S. C., Title 28, Sec. 344), provides that

Section 237 of the Judicial Code is amended to read in part as follows:

> "SECTION 237 (*a*). A final judgment or decree in any suite in the highest court of a state in which a decision in the suit can be had, * * * where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

B.

Statute of the State, the Validity of Which is Involved.

Section 3854 of Rem. Comp. Stats. of Washington (1922), being ch. 46, Laws of Washington (1909), p. 72, amending Section 3 of an Act approved March 28, 1890, Laws of Washington, 1889-1890, pages 288, 290, the validity of which is involved, reads as follows:

> "Such corporations (foreign corporations) shall also constitute and appoint an agent, who shall reside at the place in the state where the principal business of the corporation is to be carried on, to be designated as hereinafter required. Such appointment shall be in writing, signed by the president or chief officer of such corporation, and shall be attested by its corporate seal, and shall contain the name of the agent, his place of residence and the place where the principal business of such corporation is to be carried on, and shall authorize such agent to accept service of process in any action or suit pertaining to the property, business or

transactions of such corporation within this state in which such corporation may be a party. The signature of such president or chief officer, attested by the corporate seal to such written appointment, shall be sufficient proof of the appointment of such agent. Such appointment, when duly executed, shall be filed for record in the office of the secretary of state by such corporation, and shall be there recorded; and such corporation shall have and keep continually some resident agent, empowered as aforesaid during all the time such corporation shall conduct or carry on any business within this state, and service of any process, pleading, notice or other paper shall be taken and held as due service on such corporation. Such corporation may change its agent or its principal place of business, from time to time, by filing and recording with the secretary of state a new appointment, stating the change of such agent or the change in the principal place of business; and in the event such foreign corporation shall withdraw from this state and cease to transact business therein it shall continue to keep and maintain such agent within this state upon whom service of process, pleadings and papers may be made, until the statute of limitations shall have run against anyone bringing an action against said corporation, which accrued prior to its withdrawal from this state. In case said corporation shall revoke the authority of its designated agent after its withdrawal from this state and prior to the time when the statutes of limitations would have run against causes of action accruing against it, then in that event service of process, pleadings and papers in such actions may be made upon the secretary of state of the

state of Washington, and the same shall be held as due and sufficient service upon such corporation."

C.

The date of the judgment sought to be reviewed is December 2nd, 1932.

The application for appeal is presented on the 29th day of December, 1932.

D.

Nature of Case and Ruling Below.

The case is an original proceeding in the Supreme Court of the State of Washington on the application of Bond & Goodwin & Tucker, Incorporated, a dissolved Delaware corporation, for a writ of prohibition restraining and enjoining the Superior Court of the State of Washington for Spokane County and the Hon. Joseph B. Lindsley, Judge thereof, from proceeding with the trial of a cause pending in said court wherein one W. A. Monroe is plaintiff and the said Bond & Goodwin & Tucker, Incorporated, a dissolved Delaware corporation, and others, are defendants, as against said Bond & Goodwin & Tucker, Incorporated, and restraining and enjoining said Superior Court and said Judge from exercising any jurisdiction in said cause over said Bond & Goodwin & Tucker, Incorporated. Said application was based upon the following grounds:

(1) That the provisions of Section 3854 of Remington's Compiled Statutes of Washington (1922), under which service of summons and complaint upon the said

Bond & Goodwin & Tucker, Incorporated, was attempted by leaving one copy of the summons and complaint in the office of the Secretary of State, deprive the said Bond & Goodwin & Tucker, Incorporated, of its property without due process of law in violation of the provisions of Clause 1 of the Fourteenth Amendment to the Constitution of the United States and are therefore unconstitutional and void, and the said purported service of process is null and void and of no effect and the said Superior Court for Spokane County has acquired no jurisdiction over the person of the said Bond & Goodwin & Tucker, Incorporated, by reason thereof, in that the particular provisions of said Section 3854 regarding service upon a foreign corporation, where such corporation has withdrawn from the State, do not require the Secretary of State or the plaintiff in the action to give said corporation any notice of such service or any copy of the complaint or summons, or in any other way to give such corporation any notice or information as to the nature and character of the action so as to enable such corporation to make a defense thereto. (Affidavit and Application for Writ of Prohibition, par. VIII.)

(2) That said provisions of said Section 3854, Remington's Compiled Statutes of Washington (1922) deny to the said Bond & Goodwin & Tucker, Incorporated, the equal protection of the laws, in violation of Clause 1 of the Fourteenth Amendment to the Constitution of the United States in that said provisions of said section wrongfully discriminate against a foreign corporation like the said Bond & Goodwin &

Tucker, Incorporated, in that said provisions are less favorable than the similar provisions regarding service contained in Section 227 Remington's Compiled Statutes of Washington (1922) as to service on domestic corporations where no officer or agent of such corporation can be found in the State; and said provisions also wrongfully discriminate against a foreign corporation like the said Bond & Goodwin & Tucker, Incorporated, in that they are less favorable than the similar provisions of Section 7044 Remington's Compiled Statutes of Washington (1922) regarding service on foreign insurance companies (Affidavit and Application for Writ of Prohibition, par. IX).

(3) That if the alleged service was in fact made on Mr. Kitto, the Assistant Secretary of State, as the return of service on file shows, the service is void under the statute, Section 3854, and also void because in conflict with Clause 1 of the Fourteenth Amendment to the Constitution of the United States, as aforesaid (Affidavit and Application for Writ of Prohibition, par. X).

The Supreme Court of the State of Washington sustained the validity of said provisions of said Section 3854 of Remington's Compiled Statutes of Washington (1922) and sustained said attempted service of process as valid and effective to vest jurisdiction over the person of the said Bond & Goodwin & Tucker, Incorporated, a dissolved Delaware corporation, in the said Superior Court of the State of Washington for Spokane County and denied the writ of prohibition

applied for (Opinions of Court: October 13, 1932; December 2, 1932). Said Supreme Court is the highest court of the said State of Washington in which a decision in the suit can be had.

E.

Cases Believed to Sustain Jurisdiction.

The following decisions of the Supreme Court of the United States are believed to sustain jurisdiction of this appeal, to wit:

1. As to Section 3854 of Remington's Compiled Statutes of Washington (1922), depriving appellant of its property without due process of law:

Wuchter v. *Pizzutti*, 276 U. S. 13.

Consolidated Flour Mills Co. v. *Muegge*, 278 U. S. 559 (reversing *per curiam*, *Consolidated Flour Mills* v. *Muegge*, 127 Okla. 295).

2. As to Section 3854 of Remington's Compiled Statutes of Washington (1922) denying to appellant equal protection of the laws:

Kentucky Finance Corporation v. *Paramount Auto Exchange Corp.*, 262 U. S. 544.

Power Mfg. Co. v. *Saunders*, 274 U. S. 490.

3. As to service of process on an *Assistant* Secretary of State, depriving appellant of property without due process of law:

Amy v. *City of Watertown*, 130 U. S. 301.

Riverside & D. R. Cotton Mills v. *Menefee*, 237 U. S. 189.

We respectfully submit that the Supreme Court of the United States has jurisdiction of this appeal by virtue of Section 237 of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C., Title 28, Section 344).

Respectfully submitted,

ELMER E. TODD,
FRANK E. HOLMAN,
Counsel for Appellant.

FILE COPY

October Term, 1932

THE STATE OF WASHINGTON on the relation of BOND & GOODWIN & TUCKER, INCORPORATED, a dissolved Delaware corporation,

Appellant,

v.

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SPOKANE COUNTY AND HONORABLE JOSEPH B. LINDSLEY, Judge thereof,

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ELMER E. TODD,
FRANK E. HOLMAN,
Counsel for Appellant.

WILLIAM M. ALLEN,
CLARENCE B. INNIS,
Of Counsel.

Post Office Address:
1006 Hoge Building,
Seattle, Washington.

No. 663

Supreme Court of the United States

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SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SPOKANE COUNTY AND HONORABLE JOSEPH B. LINDSLEY, Judge thereof,
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Of Counsel.

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ARGUMENT:

The provision of Section 3854 of Remington's Compiled Statutes of Washington, 1922, under which service of process was made upon the appellant, deprives appellant of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that no notice of the commencement of the action against it was required to be given or in fact given to appellant 23

Appellant did not waive its constitutional objections to Section 3854 of Remington's Compiled Statutes of Washington, 1922, by entering the State of Washington and appointing an agent of its own choosing for the service of process 24

The cases cited by the appellees in the State Court, two of which were relied upon by the Supreme Court of the State of Washington, do not support the theory that appellant accepted the provision of Section 3854 of Remington's Compiled Statutes of Washington, 1922, with respect to service of process upon the Secretary of State, by entering the State and appointing a process agent of its own choosing 29

The cases of Wuchter v. Pizzutti, 276 U. S. 13, and Consolidated Flour Mills Co. v. Muegge, 278 U. S. 559, are clearly applicable to the case at bar and should have controlled the judgment of the Supreme Court of the State of Washington 39

The provision of Section 3854 of Remington's Compiled Statutes of Washington, 1922, under which service of process was made upon appellant, denies appellant the equal protection of the laws, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that there is no requirement for giving notice of the com-

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Appellees.

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BRIEF OF APPELLANT
BOND & GOODWIN & TUCKER, INCORPORATED, A DISSOLVED DELAWARE CORPORATION.

I.
OPINIONS OF THE COURT BELOW.

The final opinion of the Supreme Court of the State of Washington in this case is reported in *The State of Washington on the relation of Bond & Goodwin & Tucker, Incorporated, plaintiff, v. The Superior Court for Spokane County, et al., respondents, 169 Wash. 688.*

There were, in fact, two opinions filed, namely, an opinion filed October 13, 1932 (R. 28), and an opinion filed December 2, 1932, denying a petition for rehearing (R. 44). The reporter, in making up volume 169 of the official Washington Reports, made the original opinion of October 13, 1932, conform to the opinion filed December 2, 1932 (R. 44).

The letter "R," wherever used in this brief, means the printed transcript of record.

II.
JURISDICTION.

The appellant refers to the Statement as to Jurisdiction which is part of the record and printed separately.

III.
WASHINGTON STATUTES INVOLVED IN THIS APPEAL.

Section 3854 of Remington's Compiled Statutes of Washington, 1922, (being ch. 46, Laws of Washington (1909), p. 72, amending Section 3 of an Act approved March 28, 1890, Laws of Washington, 1889-1890, pp. 288, 290) relating to foreign corporations, reads as follows:

> "Such corporations shall also constitute and appoint an agent, who shall reside at the place in

the state where the principal business of the corporation is to be carried on, to be designated as hereinafter required. Such appointment shall be in writing, signed by the president or chief officer of such corporation, and shall be attested by its corporate seal, and shall contain the name of the agent, his place of residence and the place where the principal business of such corporation is to be carried on, and shall authorize such agent to accept service of process in any action or suit pertaining to the property, business or transactions of such corporation within this state in which such corporation may be a party. The signature of such president or chief officer, attested by the corporate seal to such written appointment, shall be sufficient proof of the appointment of such agent. Such appointment, when duly executed, shall be filed for record in the office of the secretary of state by such corporation, and shall be there recorded; and such corporation shall have and keep continually some resident agent, empowered as aforesaid during all the time such corporation shall conduct or carry on any business within this state, and service of any process, pleading, notice or other paper shall be taken and held as due service on such corporation. Such corporation may change its agent or its principal place of business, from time to time, by filing and recording with the Secretary of State a new appointment, stating the change of such agent or the change in the principal place of business; and in the event such foreign corporation shall withdraw from this state and cease to transact business therein it shall continue to keep and maintain such agent within this state upon whom service of process, pleadings and papers may be made,

until the statute of limitations shall have run against anyone bringing an action against said corporation, which accrued prior to its withdrawal from this state. In case said corporation shall revoke the authority of its designated agent after its withdrawal from this state and prior to the time when the statutes of limitations would have run against causes of action accruing against it, then in that event service of process, pleadings and papers in such actions may be made upon the secretary of state of the state of Washington, and the same shall be held as due and sufficient service upon such corporation."

Section 227 of Remington's Compiled Statutes of Washington, 1922 (being ch. CXXVII, Laws of Washington, 1893, Sec. 8, p. 409) relating to domestic corporations, reads as follows:

"Whenever any corporation, created by the laws of this state, or late territory of Washington, does not have an officer in this state upon whom legal service of process can be made, an action or proceeding against such corporation may be commenced in any county where the cause of action may arise, or said corporation may have property, and service may be made upon such corporation by depositing a copy of the summons, writ, or other process, in the office of the Secretary of State, which shall be taken, deemed and treated as personal service on such corporation; provided, a copy of said summons, writ, or other process shall be deposited in the postoffice, postage paid, directed to the secretary or other proper officer of such corporation, at the place where the main business of such corporation is transacted, when

such place of business is known to the plaintiff, and be published at least once a week for six weeks in some newspaper printed and published at the seat of government of this state, before such service shall be deemed perfect."

Section 7044 of Remington's Compiled Statutes of Washington, 1922 (being ch. 49, Laws of Washington, 1911, Sec. 13, p. 173) relating to foreign insurance companies, insofar as the provisions thereof are pertinent, reads as follows:

"Service of process against any such insurance company may be had by serving duplicate copies upon the commissioner through the mail by a registered letter, or by an officer or person competent to serve a summons. Upon such service being made, the commissioner shall forthwith mail one of such duplicate copies of such process to such company at its home office or general agency, or in the case of an alien company, to the resident manager, if any, in this country."

IV.

STATEMENT OF THE CASE.

On or about April 9, 1926, the appellant, Bond & Goodwin & Tucker, Incorporated, a Delaware corporation, qualified to do business in the State of Washington and on said date appointed one Duncan Shaw, of Seattle, Washington, as its resident agent for the service of process, as required by Section 3854, Remington's Compiled Statutes of Washington, 1922 (R.

15). On or about November 29, 1929, said Bond & Goodwin & Tucker, Incorporated, withdrew from the state of Washington and ceased to transact any business therein, and caused a formal notice of its withdrawal to be duly filed with the Secretary of State of the State of Washington on December 5, 1929 (R. 11 and 15). On or about the same date said Bond & Goodwin & Tucker, Incorporated, was duly dissolved under the laws of the State of Delaware and a certificate of such dissolution was issued by the Secretary of State of the State of Delaware on December 11, 1929 (R. 12). The appointment of said Duncan Shaw as statutory agent in the State of Washington for services of process was never revoked (R. 15). During the year 1929 said Duncan Shaw voluntarily moved from the State of Washington to the State of California (R. 16).

Shortly prior to April 18, 1932, one W. A. Monroe commenced a civil action in the Superior Court of the State of Washington for Spokane County, being Cause No. 90,636 therein, naming Bond & Goodwin & Tucker, Incorporated, as one of several defendants. The plaintiff in said action sued as an assignee of numerous persons whose residences are not stated and who may or may not have been residents of the State of Washington; also, so far as is disclosed by the typical cause of action shown in appellee's return to the alternative writ of prohibition, the alleged causes of action sued

upon may or may not have arisen in the State of Washington (R. 22). The complaint contains one hundred fifty-seven such causes of action and covers four hundred seventy-eight closely printed pages (R. 5). The appellant has never been furnished a copy of the complaint and the record does not disclose the total amount prayed for on the one hundred and fifty-seven various causes of action (R. 2, 14).

On April 18, 1932, said plaintiff caused one copy of his summons and complaint in said action to be left in the office of the Secretary of State of the State of Washington (R. 15). The return and proof of service filed by said plaintiff in the office of the Clerk of the Superior Court for Spokane County discloses that the only service of summons and complaint attempted upon appellant Bond & Goodwin & Tucker, Incorporated, was made by leaving said copy of said summons and complaint in the office of the said Secretary of State aforesaid, with one A. M. Kitto, Assistant Secretary of State (R. 7). Neither the Secretary of State nor the Assistant Secretary of State of the State of Washington forwarded to said appellant, Bond & Goodwin & Tucker, Incorporated, or to any of its officers or agents, said summons and complaint so left, as aforesaid, or any copy thereof, or any notice whatever regarding the same (R. 15), said Secretary of State of the State of Washington recognizing no legal duty to forward to said appellant or any

of its officers or agents said summons and complaint, and no legal duty to furnish said appellant with a copy thereof or any notice regarding the same (R. 15).

Except for said purported or attempted service upon the office of the Secretary of State, no service of summons or complaint has been made or attempted upon the appellant Bond & Goodwin & Tucker, Incorporated, and appellant, in fact, received no copy of any summons or complaint in said action in the Superior Court of Spokane County, nor any notice or knowledge of the action except through hearsay and report (R. 2, 13, 14).

On the 7th day of May, 1932, appellant, specially appearing in said action in the Superior Court of the State of Washington for Spokane County for that purpose and no other, filed its motion to quash service of process, supported by affidavits (R. 8). Thereafter, on the 14th day of May, 1932, appellant's motion to quash came on for hearing before the Hon. Joseph B. Lindsley, Judge of said Superior Court, and, after argument by respective counsel, said Court denied said motion, allowing appellant a stay of proceedings to enable appellant to apply to the Supreme Court of the State of Washington for an alternative writ of prohibition (R. 18).

Thereafter, in due course, the appellant applied to the Supreme Court of the State of Washington for

a writ of prohibition, prohibiting and enjoining the Superior Court of the State of Washington for Spokane County from further proceeding in said cause or exercising any jurisdiction therein over the appellant, Bond & Goodwin & Tucker, Incorporated (R. 1). An alternative writ of prohibition and an order to show cause were issued, appellees appearing thereto by demurrer (R. 19), and subsequently, by filing a return (R. 21). Thereafter the application was submitted to the Court upon printed briefs and oral argument, first before a Department of the Court on the 10th day of June, 1932, and thereafter, by order of the Court, before the Court *en banc* on the 1st day of July, 1932 (R. 28).

On October 13, 1932, an opinion of the Court was filed denying the application for writ of prohibition (R. 28). Appellant thereupon filed its petition for rehearing and/or a modification of the opinion (R. 38). On December 2, 1932, a second opinion by the Supreme Court of Washington was filed, denying appellant's petition for rehearing, but modifying the Court's former opinion in certain particulars (R. 44). On December 2nd, 1932, final judgment was entered denying the application of appellant for writ of prohibition, and from that judgment this appeal is taken (R. 45).

V.

QUESTIONS PRESENTED TO THE SUPREME COURT OF WASHINGTON AND ITS DECISION THEREON.

The questions presented to the Supreme Court of Washington involved both the "due process" and the "equal protection" provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and may be stated as follows:

(1) Whether the provision of the Washington statute (Section 3854 of Remington's Compiled Statutes of Washington, 1922) which authorizes service of process upon a foreign corporation which has withdrawn from transacting business in said State by leaving a copy thereof in the office of the Secretary of State, and which imposes no duty upon the Secretary of State or the plaintiff in the action to give the defendant corporation any notice thereof, provides for due process of law as to such corporate defendant, and whether, by such service, no notice in fact having been given, the State Court acquired jurisdiction over such corporate defendant.

(2) Whether the provision of the Washington statute (Section 3854 of Remington's Compiled Statutes of Washington, 1922) which authorizes service of process upon a foreign corporation which has withdrawn from transacting business in said State by leav-

ing a copy thereof in the office of the Secretary of State and which imposes no duty upon the Secretary of State or the plaintiff in the action to give such corporate defendant any notice thereof, affords such corporate defendant the equal protection of the laws, when, in the case of domestic corporations having no officer in said State upon whom legal service of process can be made, notice to such corporations is required (Section 227 of Remington's Compiled Statutes of Washington, 1922) where service is made on the Secretary of State, and when, in the case of foreign insurance companies, notice to such foreign insurance corporations is required (Section 7044 of Remington's Compiled Statutes of Washington, 1922) where service is made on the State Insurance Commissioner.

(3) Whether service of process by leaving a copy thereof in the office of the Secretary of State with the Assistant Secretary of State, where the defendant is a foreign corporation and has withdrawn from transacting business in the State, and the statute (Section 3854 of Remington's Compiled Statutes of Washington, 1922) does not designate the Assistant Secretary of State for that purpose and does not impose upon him any duty to give notice, constitutes due process of law as to said foreign corporation.

The Supreme Court of the State of Washington answered all of the foregoing questions in the affirma-

tive, three of the Justices thereof dissenting (169 Wash. 688).

VI.

SPECIFICATION OF ERRORS.

The errors assigned in the record which appellant intends to urge and upon which appellant relies for a reversal of the judgment of the Supreme Court of the State of Washington dated December 2, 1932, are:

(1) The Supreme Court of the State of Washington erred in holding that the provisions of Section 3854 of Remington's Compiled Statutes of Washington, 1922, under which service of summons and complaint upon the appellant, Bond & Goodwin & Tucker, Incorporated, was attempted by leaving one copy of said summons and complaint in the office of the Secretary of State of the State of Washington, are not repugnant to and are not in conflict with and are not in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that the particular provisions of said Section 3854 regarding service of process upon a foreign corporation, where such corporation has withdrawn from the State, do not require the Secretary of State or the plaintiff in the action to give said corporation any notice of such service of process or any copy of the summons or complaint or in any other way to give such corporation any notice or information as to the nature and char-

acter of the action so as to enable such corporation to make a defense thereto and the State of Washington, by and through said Section 3854, assumes and seeks to deprive the appellant of its property without due process of law (R. 47).

(2) The Supreme Court of the State of Washington erred in holding that the provisions of Section 3854 of Remington's Compiled Statutes of Washington, 1922, under which service of summons and complaint upon the appellant Bond & Goodwin & Tucker, Incorporated, was attempted by leaving one copy of said summons and complaint in the office of the Secretary of State of the State of Washington, are not repugnant to and are not in conflict with and are not in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that the particular provisions of said Section 3854 regarding service of process upon a foreign corporation, where such corporation has withdrawn from the State, are less favorable than similar provisions regarding service of process contained in Section 227 of Remington's Compiled Statutes of Washington, 1922, as to service on domestic corporations, where no officer or agent of such corporation can be found in the State, and are less favorable than similar provisions regarding service of process contained in Section 7044 of Remington's Compiled Statutes of Washington, 1922, as to service of process on foreign insur-

ance companies, and the State of Washington, by and through said Section 3854, assumes and seeks to deny to the appellant the equal protection of its laws (R. 47).

(3) The Supreme Court of the State of Washington erred in holding that under the provisions of Section 3854 of Remington's Compiled Statutes of Washington, 1922, jurisdiction over the person of the appellant Bond & Goodwin & Tucker, Incorporated, was acquired by the Superior Court of the State of Washington for Spokane County in the case of *W. A. Monroe, Plaintiff v. Vancouver Kraft Company, Ltd., Bond & Goodwin & Tucker, Incorporated, and others Defendants*, pending in said Court, by leaving one copy of the summons and complaint in said action with the Assistant Secretary of State of the State of Washington, in that said Section 3854 does not provide for service of process upon a foreign corporation, after it has withdrawn from the State, by leaving a copy of the summons and complaint with the Assistant Secretary of State of the State of Washington and does not require the Assistant Secretary of State or the plaintiff in the action to give said corporation any notice of such service or any copy of the summons or complaint or in any other way to give such corporation any notice or information as to the nature and character of the action so as to enable such corporation to make a defense

thereto and by and through such attempted service of process the State of Washington assumes and seeks to deprive the appellant of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States (R. 48).

(4) The Supreme Court of the State of Washington erred in holding that jurisdiction over the person of the appellant Bond & Goodwin & Tucker, Incorporated, was acquired by the Superior Court of the State of Washington for Spokane County in the case of *W. A. Monroe, Plaintiff v. Vancouver Kraft Company, Ltd., Bond & Goodwin & Tucker, and others, Defendants*, pending in said court, by leaving one copy of the summons and complaint in said action with the Assistant Secretary of State of the State of Washington, in that, under the provisions of Section 3854 of Remington's Compiled Statutes of Washington, 1922, there is no provision for service of process upon the Assistant Secretary of State and by such service of process the State of Washington assumes and seeks to deprive appellant of its property without due process of law, contrary to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States (R. 49).

(5) The Supreme Court of the State of Washington erred in holding that the Superior Court of the State of Washington for Spokane County acquired

jurisdiction over the person of the appellant Bond & Goodwin & Tucker, Incorporated, in the case of *W. A. Monroe, Plaintiff v. Vancouver Kraft Company, Ltd., and Bond & Goodwin & Tucker, Incorporated, and others, Defendants,* in that the attempted service of process upon the appellant, Bond & Goodwin & Tucker, Incorporated, personally, within the State of Washington after it had withdrawn from said State, by leaving a copy of the summons and complaint with the Secretary or Assistant Secretary of State of the State of Washington, in the manner provided by Section 3854 of Remington's Compiled Statutes of Washington, 1922, is repugnant to and in conflict with and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and thereby the State of Washington assumes and seeks to deny the appellant the equal protection of its laws (R. 49).

(6) The Supreme Court of the State of Washington erred in denying to the appellant a permanent writ of prohibition enjoining and restraining the Superior Court of the State of Washington for Spokane County from proceeding with the trial of the cause pending before it entitled *W. A. Monroe, Plaintiff v. Vancouver Kraft Company, Ltd., and Bond & Goodwin & Tucker, Incorporated, and others, Defendants,* as against the appellant, and from exercising any jurisdiction therein over the appellant, in that the at-

tempted service of process upon the appellant, by leaving a copy of the summons and complaint with the Secretary or Assistant Secretary of State of the State of Washington in the manner provided by Section 3854 of Remington's Compiled Statutes of Washington, 1922, under which attempted service of process said Superior Court claims to have acquired such jurisdiction, was and is repugnant to and in conflict with and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and thereby the State of Washington assumes and seeks to deprive the appellant of its property without due process of law and to deny to appellant the equal protection of its laws (R. 50).

VII.

SUMMARY OF ARGUMENT.

The proceeding below and this appeal directly raise the question of the jurisdiction of the Superior Court of the State of Washington for Spokane County over the person of the appellant Bond & Goodwin & Tucker, Incorporated.

The principal question involved, succinctly stated, is whether a state may consistently with the "due process" clause of the Fourteenth Amendment to the Constitution of the United States confer on its courts jurisdiction *in personam* over a foreign corporation which has withdrawn from the State and ceased to do

business therein, by service of process upon a State officer *but without imposing upon said State officer the duty of giving to such corporation any notice whatsoever of the commencement of the action.*

Subordinate to the proposition above stated is the further question whether a State may consistently with the "equal protection" clause of the Fourteenth Amendment to the Constitution of the United States confer on its courts jurisdiction *in personam* over a foreign corporation which has withdrawn from the State and ceased to do business therein, by service of process upon a State officer *but without imposing upon said State officer the duty of giving to such corporation any notice whatsoever of the commencement of the action*, when, in the case of a domestic corporation having no officer in said State, notice to such corporation is required in case of service on a State officer, and when, likewise, in the case of a foreign insurance company, notice to such foreign insurance company is required when service is made on a State officer.

Even though the foregoing questions should be resolved against the appellant, there still remains the question whether a State may consistently with the "due process" clause of the Fourteenth Amendment to the Constitution of the United States confer on its courts jurisdiction *in personam* over a foreign corporation which has withdrawn from the State and ceased to do business therein, by service of process upon an

assistant State officer (to-wit, an Assistant Secretary of State) without designating such assistant State officer by its statute as a person upon whom process may be served and without imposing upon him any duty of giving to the defendant corporation any notice of the commencement of the action.

Appellant's argument will discuss the foregoing questions with reference to the treatment given them by the Supreme Court of the State of Washington and in connection with the authorities cited to the State Court by the appellees. The points advanced in appellant's argument are as follows:

(1) The provision of Section 3854 of Remington's Compiled Statutes of Washington, 1922, under which service of process was made upon the appellant, deprives appellant of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that no notice of the commencement of the action against it was required to be given or in fact given to appellant (pages 23 to 24).

(2) Appellant did not waive its constitutional objections to Section 3854 of Remington's Compiled Statutes of Washington, 1922, by entering the State of Washington and appointing an agent of its own choosing for the service of process (pages 24 to 29).

(3) The cases cited by the appellee in the State Court, two of which were relied upon by the Supreme

Court of the State of Washington, do not support the theory that appellant accepted the provisions of Section 3854 of Remington's Compiled Statutes of Washington, 1922, with respect to service of process upon the Secretary of State, by entering the State and appointing a process agent of its own choosing (pages 29 to 39).

(4) The cases of *Wuchter v. Pizzutti*, 276 U. S. 13, and *Consolidated Flour Mills Co. v. Muegge*, 278 U. S. 559, are clearly applicable to the case at bar and should have controlled the judgment of the Supreme Court of the State of Washington (pages 39 to 43).

(5) The provision of Section 3854 of Remington's Compiled Statutes of Washington, 1922, under which service of process was made upon appellant, denies appellant the equal protection of the laws, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that there is no requirement for giving notice of the commencement of the action, whereas when service is made under other statutes upon corporations similarly situated, notice is required to be given (pages 43 to 47).

(6) The attempted service of process upon appellant corporation by leaving a copy thereof with the Assistant Secretary of State does not constitute that due process of law required by Section 1 of the Fourteenth Amendment to the Constitution of the United States where the statute does not name the Assistant Secretary of State as a person upon whom process may be served and does not impose upon him any duty to give notice (pages 47 to 49).

VIII.

ARGUMENT.

The Provision of Section 3854 of Remington's Compiled Statutes of Washington, 1922, Under Which Service of Process Was Made Upon the Appellant, Deprives Appellant of Its Property Without Due Process of Law, in Violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States in That No Notice of the Commencement of the Action Against It Was Required To Be Given or in Fact Given to Appellant.

The provision of Section 3854 of Remington's Compiled Statutes of Washington, 1922, regarding service upon a foreign corporation which has withdrawn from the State, is in conflict with the "due process" clause of the Fourteenth Amendment to the Constitution of the United States in that neither the State officer upon whom process is to be served, nor the plaintiff in the action, is required by the statute to give the defendant corporation any notice of the service or any copy of the complaint or summons, or otherwise to inform the defendant corporation of the commencement of the action so as to enable it to make a defense thereto. Therefore, the attempted service of summons and complaint in the instant case upon appellant Bond & Goodwin & Tucker, Incorporated, by leaving one copy of the summons and complaint in the office of the Secretary of State of the State of Washington, though authorized by State statute, deprives appellant of its property without due process of law,

in violation of the "due process" clause of the Fourteenth Amendment to the Constitution of the United States. Said State statute is, accordingly, unconstitutional and void and said purported service of process is invalid and the Superior Court of the State of Washington for Spokane County acquired no jurisdiction over the person of appellant by reason thereof.

This Court has always recognized that notice of some character, reasonably calculated to bring home to a defendant the fact that an action has been commenced and the character thereof is an essential element of due process of law. In two recent cases it has been held by this Court that State statutes providing for service of process upon State officers in actions against non-residents, both individual and corporate, do not provide due process of law where they do not impose upon the State officer any duty or obligation to give the non-resident defendant notice of the commencement of the action.

Wuchter v. Pizzutti, 276 U. S. 13.

Consolidated Flour Mills Co. v. Muegge, 278 U. S. 559; reversing 127 Okla. 295.

Appellant Did Not Waive Its Constitutional Objections to Section 3854 of Remington's Compiled Statutes of Washington, 1922, by Entering the State of Washington and Appointing an Agent of Its Own Choosing for the Service of Process.

The Supreme Court of the State of Washington, in its decision in the instant case (169 Wash. 688),

recognized the general doctrine announced in the two decisions of the Supreme Court of the United States above cited, but held the service of process upon the appellant herein valid on the theory that appellant, in entering the State of Washington and by appointing an agent for the service of process as required by Section 3854, thereby accepted the provisions of said Section with respect to service of process on the Secretary of State and forever waived its right to object thereto later on.

The fact is, however, that when appellant entered the State of Washington to do business therein and complied with Section 3854 to the extent of designating an agent of its own choosing for the service of process, its consent went no further than a consent to be bound by a service made upon its designated agent, and it was not then required to face and did not face the further provision of the statute regarding service upon the Secretary of State, and was not then called upon to waive and did not waive any rights conferred upon it by the Constitution of the United States regarding the particular provision of said Section 3854 providing for service upon the Secretary of State.

It is not the law that a foreign corporation, by the mere fact of its entering a State to do business and its compliance with a State statute insofar as the same is constitutional, thereby waives its right to ob-

ject to other and unconstitutional provisions of the same statute. No general waiver of constitutional rights arises by a compliance with the constitutional provisions of a State statute and no State may exact of a foreign corporation, as a condition of its doing business in the State, a waiver of its constitutional rights.

That a foreign corporation is not so prevented from raising a question, under the Constitution of the United States, regarding a state statute, is amply sustained by the decisions of the Supreme Court of the United States. These decisions are all to the effect that while a State may deny to a foreign corporation the right to transact business within its borders and therefore attach to the grant of such privilege any condition which it chooses, yet the conditions must not have the effect of depriving such corporation of its constitutional rights. The Court holds that in such cases the obtaining by a foreign corporation of permission to do business in the State and/or its actual transaction of business in the State and/or its action in accepting that part or portion of the State's statutes which are constitutional, is not a waiver of any constitutional right which it may have as against unconstitutional provisions of the state's statutes, nor is the foreign corporation in any wise estopped to assert the invalidity of any statute on constitutional grounds.

Hanover Fire Ins. Co. v. Carr, 272 U. S. 494;
Power Mfg. Co. v. Saunders, 274 U. S. 490;
Quaker City Cab Co. v. Penn., 277 U. S. 389;
Terral v. Burke Const. Co., 257 U. S. 529;
Frost v. R. R. Comm., 271 U. S. 583;
Fidelity & Deposit Co. v. Tafoya, 270 U. S. 426.

To put the matter more specifically we desire to quote from three of the foregoing cases.

In the *Terral* case, the same State statute that contained the provisions regarding the admission of a foreign corporation to do business in the State of Arkansas also contained an unconstitutional provision regarding removal of causes, and this latter provision of the statute was under attack, just as the latter provision of Section 3854 of Remington's Compiled Statutes of Washington (1922) is here under attack. The Court said:

> "The principle established by the more recent decisions of this Court is that a State may not, in imposing conditions upon the privilege of a foreign corporation's doing business in the State, exact from it a waiver of the exercise of its constitutional right to resort to the Federal Courts or thereafter withdraw the privilege of doing business because of its exercise of such right, whether waived in advance or not."

In the *Hanover Fire Insurance Company* case, the Court said:

"One argument urged against our conclusion is that the relation of a foreign insurance company to the State which permits it to do business within its limits is contractual, and that by coming into the State and engaging in business on the conditions imposed, it waives all constitutional restrictions and can not object to a condition or law regulating its obligations even though as a statute operating *in invitum* it may be in conflict with constitutional limitations. This argument cannot prevail in view of the decisions of this court in well-considered cases."

In the *Power Manufacturing Co.* case, the Court said:

"The contention advanced by counsel for the plaintiff that the defendant impliedly assented to the venue provisions is answered and refuted by repeated decisions holding that a foreign corporation by seeking and obtaining permission to do business in a State does not thereby become obligated to comply with or estopped from objecting to any provision in the State statutes which is in conflict with the Constitution of the United States. The principal cases are cited and reviewed in *Hanover F. Ins. Co. v. Harding* (*Hanover F. Ins. Co. v. Carr*), 272 U. S. 494, 507, *et seq.*, *ante*, 372, 49 A. L. R. 713, 47 Sup. Ct. Rep. 179, and *Frost & F. Trucking Co. v. Railroad Commission*, 271 U. S. 583, 594, *et seq.*, 70 L. ed. 1101, 1105, 47 A. L. R. 457, 46 Sup. Ct. Rep. To them may be added the case of *W. W. Cargill Co. v. Minnesota*, 180 U. S. 452, 468, 45 L. ed. 619, 626, 21 Sup. Ct. Rep. 423, where it was held that 'the acceptance of a license, in whatever form, will not impose upon the licensee an obligation to respect or

to comply with any provisions of the statute * * * that are repugnant to the Constitution of the United States.' "

The Cases Cited by the Appellees in the State Court, Two of Which Were Relied Upon by the Supreme Court of the State of Washington, Do Not Support the Theory That Appellant Accepted the Provision of Section 3854 of Remington's Compiled Statutes of Washington, 1922, with Respect to Service of Process Upon the Secretary of State, by Entering the State and Appointing a Process Agent of Its Own Choosing.

The appellees in their brief and argument before the Supreme Court of Washington sought to distinguish the case of *Wuchter v. Pizzutti*, 276 U. S. 13, and the case of *Consolidated Flour Mills Co. v. Muegge*, 278 U. S. 559, upon the ground that, in the *Wuchter* case, an individual defendant, and, in the *Muegge* case, a corporate defendant, had entered the respective States without in any way attempting to comply with their laws, whereas, in the instant case, appellant had complied with the law of Washington to the extent at least of appointing a resident agent for the service of process, and had thereby accepted all the provisions of Section 3854 of Remington's Compiled Statutes of Washington, 1922, including the provision with respect to service of process upon the Secretary of State. The Supreme Court of Washington accepted the distinction urged by appellees, relying chiefly upon the cases of *Mutual Reserve Fund Life Association v. Phelps*, 190 U. S. 147, and *Pennsyl-*

vania Fire Insurance Co. v. Gold Issue Mining & Milling Co., 243 U. S. 93.

Appellant's first answer to the foregoing purported distinction is that the distinction itself is not sound. This Court has held that in the matter of the constructive presence of a foreign corporation, no difference exists in the law with respect to such corporation's express or implied acceptance of local laws based upon the fact that the corporation has or has not in some measure complied with those laws in transacting its business in the particular State. In other words, consent to the unconstitutional provisions of a State statute is no more to be implied from the fact of having complied with the constitutional provisions of the same statute than such consent is to be implied from the mere doing business in the State without any attempt at compliance with the State statutes.

> *Old Wayne Mutual Life Association v. McDonough*, 204 U. S. 8.

Neither the case of *Mutual Reserve Fund Life Association v. Phelps*, 190 U. S. 147, nor the case of *Pennsylvania Fire Insurance Co. v. Gold Issue Mining & Milling Co.*, 243 U. S. 93, relied upon by the Supreme Court of Washington, supports the doctrine that a foreign corporation, by complying with the constitutional provisions of a State statute, thereby ac-

cepts all the provisions of the same statute, including the unconstitutional provisions thereof.

In the first of the foregoing cases (*Mutual Reserve Fund Life Association v. Phelps*) the State statute involved expressly provided that a foreign corporation, upon entering the State, should consent to service upon a designated agent or upon the Insurance Commissioner. Acting under this statute, the defendant corporation filed its consent to service on the Insurance Commissioner. Therefore, the defendant corporation, in the most formal manner, consented that it might be served with process through service made on the Insurance Commissioner. After the corporation had withdrawn from the State it attempted to avoid the effect of its formal consent. The Court held that the service of process on the Insurance Commissioner was valid. It is important to point out, however, that the State statute in this case required that the Insurance Commissioner, upon being served, should mail the process to the corporation at its principal office. In other words, the State statute fulfilled the very requirement of giving notice, whereas, in the instant case, the Washington State statute provides for no notice whatever. The Supreme Court of Washington, in its discussion of this case, seems to have overlooked the fact that the Kentucky statute, as quoted by Mr. Justice Brewer in the Statement of the Case, shows an express provision for the mailing of notice.

The general language used in the decision regarding the question of consent must, of course, be read in the light of the facts of the case, which were, as heretofore pointed out, that the defendant corporation had specifically consented that service might be made upon the Insurance Commissioner, and the sole question was whether or not such service would sustain an action brought against the Company after it had withdrawn from the State.

In the case of *Pennsylvania Fire Insurance Co. v. Gold Issue Mining & Milling Co.*, 243 U. S. 93, the action arose in the State of Missouri on an insurance policy issued by the defendant corporation in the State of Colorado. The defendant corporation was doing business in Missouri and had filed in that State a power of attorney, consenting to service of process on the Superintendent of Insurance, as required by the Missouri statute. The contention in the case was that the Missouri statute only authorized service in suits growing out of local business and, if otherwise construed, would be unconstitutional. The Missouri Supreme Court held that the statute applied. This Court held that the construction of the statute by the Missouri court left no constitutional question open because the corporation had, by a formal document, expressly consented that service of process upon the Superintendent of Insurance should be deemed personal service upon the Company, and that where a corporation

had thus *expressly* consented to be sued by service upon a State official, it took the risk of such interpretation as the State Court might put upon the statute with respect to actions which could be brought under it. No question regarding notice was raised or decided in this case and the case has no bearing upon the question now before this Court.

In addition to the two cases just discussed, namely, *Mutual Reserve Fund Life Association v. Phelps*, 190 U. S. 147, and *Pennsylvania Fire Insurance Co. v. Gold Issue Mining & Milling Co.*, 243 U. S. 93, relied upon by the Supreme Court of Washington, counsel for appellees cited to the State Court several cases decided by lower Federal Courts and by State Courts to which a short reference will be made for the purpose of showing that they are inapplicable to the situation involved in the case at bar.

In all of the cases so cited by appellees (except the cases of *Olender v. Crystalline Mining Co.*, 149 Cal. 482, *Western Grocer Co. v. New York Oversea Co.*, 296 Fed. 269, and *Davis v. Kansas & Texas Coal Co.*, 129 Fed. 149) the particular State statutes before the Court required some form of notice to the defendant. The language of a court used in sustaining a State statute actually providing for notice is clearly not applicable to a statute like the Washington statute which provides for *no* notice to a defendant.

Kelly v. Johnson Nut Co., 38 Fed. (2) 177, C. C. A. 6th Circuit (Ohio), (1930).

In this case service of process was made upon an agent expressly appointed by the corporation for that purpose. The question involved in the case was the effect of the corporation's withdrawal from the State upon the court's jurisdiction of a cause of action arising out of transactions in the State.

Chenalis River Lbr. & Sh. Co. v. Empire State Surety Co., 206 Fed. 559 (Western District of Wash. 1913).

The portions of the Washington statute set out in the opinion do not show the fact that they did provide that where service of summons is made upon the Insurance Commissioner in an action against a foreign corporation, the Commissioner shall mail a copy of the process to the defendant at its home office or general agency. (See Chap. 49, Laws of Wash. 1911, p. 173, Sec. 13.) The only question before the Court in this case was the effect of the corporation's withdrawal from the State upon the jurisdiction of the Court where a service of summons had been made on the Insurance Commissioner after such withdrawal.

DuPont Engineering Co. v. Harvey Construction Co., 156 Va. 582, (1931).

The question involved in this case was the effect of the withdrawal and dissolution of a Delaware corporation upon the jurisdiction of the Virginia Court acquired by service of process on the Secretary of State, expressly appointed by the corporation as its agent for such service. While

the opinion does not disclose the duties of the Secretary of State in case he is served with process, the Virginia statute is set out in full in the earlier case of *American Railway Express Co. v. Fleishman,* 149 Va. 200, which is cited and relied upon in the *DuPont* case. An examination of this statute shows an express requirement that the Secretary of State shall mail a copy of the process to the defendant corporation.

Frazier v. Steele & Tube Co., 101 W. Va. 327, (1926).

This case, likewise, involved the question of the effect of a corporation's withdrawal from the State upon the jurisdiction of the State Court acquired by service of process on the State Auditor, who was designated by statute as the agent of the corporation for that purpose. The duties of the State Auditor are not disclosed by the opinion, but a reference to the West Virginia statute shows that there was an express provision that the State Auditor should transmit process served upon him by registered mail to the defendant corporation. (See W. Va. Code 1919, ch. 54, Sec. 24-a; also W. Va. Code 1931, ch. 31, Art. 1, Sec. 71; also *St. Mary's Franco-American Petroleum Co. v. W. Va.,* 203 U. S. 183, where an earlier West Virginia statute with similar provisions as to notice is fully set out.)

As heretofore indicated, all of the cases cited by appellee, except the three cases next to be considered, were decided in connection with State statutes which required the State official upon whom process was served to give some notice thereof to the defendant corporation.

In *Olender v. Crystalline Min. Co.,* 149 Cal. 482, (decided in 1906), the Court had before it a State statute which made no provision for notice. The defendant corporation in that case was doing business in the State but had not appointed an agent for the service of process. The Court said:

> "It is therefore in no position to invoke the constitutional doctrine that the defendant must have notice of an action against him and an opportunity to be heard."

This case was relied upon by the Supreme Court of Oklahoma in *Kaw Boiler Works v. Frymyer,* 100 Okla. 81, which in turn was the basis of the decision in *Consolidated Flour Mills Co. v. Muegge,* 127 Okla. 295, which latter case was reversed on this point by the Supreme Court of the United States in *Consolidated Flour Mills Co. v. Muegge,* 278 U. S. 559. So far as the *Olender* case is concerned, it is to be noted that the legislature of California, in 1929, amended the California statute so as to require the Secretary of State not only to forward the process served upon him to the principal office of the defendant corporation, but, also, immediately upon being served, to telegraph the defendant corporation that such service had been made. The California statute also requires that the plaintiff shall furnish the Secretary of State with the defendant's address in case such address is not on file. (California Laws, 1929, ch. 712; laws of 1931, ch. 682, Sec. 406-a.)

It is noteworthy that the legislature of the State of California changed the law of that State to provide for adequate notice to a non-resident defendant corporation, in spite of the decision in the case of *Western Grocer Co. v. New York Oversea Co.*, 296 Fed. 269, (decided in 1924), which is one of the three cases specially relied upon by counsel for appellees in the lower court. We respectfully submit, however, that, in the *Western Grocer* case, the point was not raised that the then California statutes providing for service of process on the Secretary of State were invalid because they failed to provide for notice to a non-resident defendant corporation of the commencement of an action. A reading of the opinion clearly discloses that the case was disposed of by reference to the decision in *Mutual Reserve Fund Life Association v. Phelps*, 190 U. S. 147, and *Davis v. Kansas & Texas Coal Co.*, 129 Fed. 149, and, like them, only involved the question of whether a foreign corporation, by its mere withdrawal from a State, might defeat jurisdiction where jurisdiction otherwise existed.

Davis v. Kansas & Texas Coal Co., 129 Fed. 149, Circuit Court, Western Dist. of Arkansas.

The statute of Arkansas provided for service of process on the State Auditor in case a foreign corporation doing business in the State failed to appoint an agent. No point was raised in

> the case regarding the unconstitutionality of the State statute on the ground that it did not require notice to the defendant of the commencement of the action. Whatever the Arkansas statutes may have required at the time this case was decided in 1904, the Arkansas legislature, by an Act of 1917 having provided for the appointment of the Secretary of State as the person upon whom process could be served, specifically required that the Secretary of State should cause the process to be mailed to the defendant's principal office. (See Crawford and Moses 1921 Dig., Sec. 1827.)

At this point, we may also point out that the legislature of the State of Oklahoma, since the decision by this Court in the *Mucgge* case, has amended its statute so as to require that in case of service upon the Secretary of State plaintiff must set out in his petition the address of the Secretary of the foreign corporation and the Secretary of State is required to immediately forward a copy of the summons to such Secretary of said defendant corporation. (Compiled Statutes of Okla. 1921, Sec. 5442, as amended by Laws of 1929, ch. 226.)

In other words, whatever may be said of the *Olender* case, the *Western Grocer* case and the *Davis* case, it now transpires that both the California and the Arkansas legislatures have amended the statutes in those States so that when service of process is made upon a State official in an action instituted against a foreign corporation that has withdrawn from the

State, adequate provision for notice of the commencement of the action is assured, and as to all the other cases cited by the appellee an examination of the State statutes discloses that adequate provision had already been made in each State for notice of the commencement of an action against a foreign corporation after it has withdrawn from the State, where service of process is made upon a State official.

The cases of Wuchter v. Pizzutti, 276 U. S. 13, and Consolidated Flour Mills Co. v. Muegge, 278 U. S. 559, Are Clearly Applicable to the Case at Bar and Should Have Controlled the Judgment of the Supreme Court of the State of Washington.

It is clear that prior to the case of *Wuchter v. Pizzutti*, 276 U. S. 13, and the case of *Consolidated Flour Mills Co. v. Muegge*, 278 U. S. 559, the Supreme Court of the United States had not specifically passed upon the question of whether a State statute like Section 3854 of Remington's Compiled Statutes of Washington, 1922, providing for service of process upon a State officer without any manner of notice to the defendant corporation, was constitutional under Section 1 of the Fourteenth Amendment to the Constitution of the United States. Prior to the *Wuchter* case several State Courts of last resort, as in California and Oklahoma, had held such a service statute good. (See *Olender v. Crystalline Min. Co.*, 149 Cal. 482; *Kaw Boiler Wks. v. Frymyer*, 100 Okla. 81; *Consolidated Flour Mills Co. v. Muegge*, 127 Okla. 295.) At

the same time several other State Courts of last resort had held such statutes unconstitutional in that they failed to provide any manner of notice to the defendant corporation. (See *Gonner v. Miss. Valley Bridge & Iron Co.*, 123 La. 964; *Pinney v. Providence Loan, etc., Co.*, 106 Wis. 396.) Also, insofar as the lower Federal Courts had spoken on this particular subject, *namely, the necessity for some form of notice to the defendant corporation*, these Courts had held that a service statute which contained no provision for such notice was unconstitutional. (*Knapp v. Bullock Tractor Co.*, 242 Fed. 543; *Southern Railway Co. v. Simon*, 184 Fed. 959.) In this state of the authorities the *Wuchter* case was decided by the Supreme Court of the United States in February, 1928.

It is true that this decision concerned an individual and not a corporation. It is also true that in one paragraph of the decision Mr. Chief Justice Taft stated that the cases affecting non-resident corporations were not especially applicable, and added in this connection that:

> "Such corporations may be properly required to accept service through a public officer as a condition of their doing business in the state. Their knowledge of the statutory requirement may perhaps prompt frequent inquiry as to suits against them, of their appointed agent or at the office of the public official to be served, but it could hardly be fair or reasonable to require a non-resident

> individual owner of a motor vehicle who may use the state highways to make constant inquiry of the Secretary of State to learn whether he has been sued."

But, in the same paragraph, and in order that the foregoing language might not be misapplied, the then Chief Justice used the following language:

> "Even in cases of non-resident corporations, it has been held that a statute directing service upon them by leaving process with a State official is void if it contains no provision requiring the official, upon whom the service may be made, to give the foreign corporations notice that suit has been brought and citation served. *Southern R. Co. v. Simon* (C. C.), 184 Fed. 959, 961; *Gouner v. Missouri Valley Bridge & Iron Co.*, 123 La. 964. In the latter case, the Louisiana Court said in respect to such a law: 'This law makes no provision whatever for the service on the defendant. The officer may decline to communicate with the person sued and give no notice whatever; not even by mail. A judgment might be obtained without the least knowledge of the person sued. Under the phrasing of the statute, the duty of the officer begins and ends in his office. If such a judgment were rendered, it could receive no recognition whatever at the place of the domicil. When a petition can not legally be served on a defendant, the court can exercise no jurisdiction over him. The service defines the court's jurisdiction.' "

In the immediately following paragraph, obviously referring to the question of service on a foreign

corporation under a statute that fails to provide for notice, Mr. Chief Justice Taft stated:

> "The question is mooted in *Simon v. Southern R. Co.*, 236 U. S. 115, 129, and the above language is quoted, but it was not found necessary to decide the point."

In other words, the then Chief Justice did not state or intend to state, as might have been inferred from the earlier language of the opinion, that in the case of a foreign corporation, service upon a state official would be good regardless of notice, for he specifically points out that while this question had been mooted in the *Simon* case, it had not been there decided.

When, however, in the October term of 1928, the case of *Consolidated Flour Mills Co. v. Muegge*, 278 U. S. 559, came to the Supreme Court of the United States, a direct decision regarding the constitutionality of a State service statute which provided for service upon a foreign corporation by serving a State officer but containing no requirement providing for notice to the defendant, was unavoidable. It then became necessary for the Supreme Court of the United States to determine whether the principle regarding this question of the necessity of notice, which it had applied to a non-resident individual in the case of *Wuchter v. Pizzutti*, 276 U. S. 13, should also be applied for the protection of a foreign corporation.

Therefore, we respectfully submit that the Supreme Court in its *per curiam* opinion in the *Muegge* case necessarily directly determined this latter question when it reversed the decision of the Supreme Court of Oklahoma and predicated its reversal upon the authority of the *Wuchter* case.

Hence, it is now the established law that a State statute providing for service upon a State officer in a suit against a foreign corporation must provide some manner of notice to the defendant in order to bring the statute within the "due process" provision of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

The Provision of Section 3854 of Remington's Compiled Statutes of Washington, 1922, Under Which Service of Process Was Made Upon Appellant, Denies Appellant the Equal Protection of the Laws, in Violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States in That There Is No Requirement for Giving Notice of the Commencement of the Action, Whereas When Service Is Made Under Other Statutes Upon Corporations Similarly Situated Notice Is Required To Be Given.

The statutes involved at this point in the argument are set out in full at pages 4 to 7 of this brief, but are here re-stated in part for the purpose of comparison.

The particular provision of Section 3854 of Remington's Compiled Statutes of Washington, 1922, here pertinent, reads as follows:

"In case said corporation shall revoke the authority of its designated agent after its withdrawal from this State and prior to the time when the statutes of limitations would have run against causes of action accruing against it, then in that event service of process, pleadings and papers in such actions may be made upon the Secretary of State of the State of Washington, and the same shall be held as due and sufficient service upon such corporation."

Section 227, Remington's Compiled Statutes of Washington, 1922, providing for service of process on a domestic corporation where no officer of such corporation is in the State, reads as follows:

"Whenever any corporation, created by the laws of this State, or late Territory of Washington, does not have an officer in this State upon whom legal service of process can be made, an action or proceeding against such corporation may be commenced in any county where the cause of action may arise, or said corporation may have property, and service may be made upon such corporation by depositing a copy of the summons, writ, or other process, in the office of the Secretary of State, which shall be taken, deemed and treated as personal service on such corporation; provided, a copy of said summons, writ, or other process shall be deposited in the postoffice, postage paid, directed to the secretary or other proper officer of such corporation at the place where the main business of such corporation is transacted, when such place of business is known to the plaintiff, and be published at least once a week for six weeks in some newspaper

printed and published at the seat of government of this State, before such service shall be deemed perfect."

The particular provision of Section 7044 of Remington's Compiled Statutes of Washington, 1922, here pertinent, applying to foreign insurance companies, reads as follows:

"Service of process against any such insurance company may be had by serving duplicate copies upon the commissioner through the mail by a registered letter, or by an officer or person competent to serve a summons. Upon such service being made, the commissioner shall forthwith mail one of such duplicate copies of such process to such company at its home office or general agency, or in the case of an alien company, to the resident manager, if any, in this country."

An examination of the foregoing statutory provisions clearly discloses that in the case of a foreign insurance company and in the case of a Washington corporation having no officer in the State upon whom service of process can be made, the Washington law, in providing for service of process upon a State officer, also provides for the giving of notice to the defendant in the action. Where the foreign corporation is an insurance company, the State officer, to-wit, the Insurance Commissioner, is required to mail a duplicate copy of the process to the Company; or, in the case of an alien company, to its resident manager. Where the corporation is a domestic corporation hav-

ing no officer in the State, the service on the corporation is not effective unless a copy of the summons, writ or other process is deposited in the post office, postage paid, directed to the Secretary or other proper officer of the defendant corporation and published in a newspaper for a specified period.

If the appellant is to be deemed as constructively in the State of Washington for the purpose of service of process and the exercise over it of the State Court's jurisdiction *in personam*, then it is clear from the foregoing resume of the Washington statutes that as between the appellant and a foreign insurance company similarly situated, and as between the appellant and a domestic corporation similarly situated, there is a wrongful discrimination resulting in a denial of the equal protection of the laws guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Kentucky Finance Corporation v. Paramount Auto Exchange, 262 U. S. 544.

Power Mfg. Co. v. Saunders, 274 U. S. 490.

As against appellant's contention in this regard, counsel for appellees cited to the State Court the cases of *Hartford Fire Insurance Co. v. Perkins*, 125 Fed. 502, *Shafer Iron Co. v. Iron Circuit Judge*, 88 Mich. 464, and *Douglas v. N. Y., N. H. & H. R. R. Co.*, 279 U. S. 377. It is sufficient to say that an examination of these cases throws no light upon the question.

The first two cases went off on the question of waiver of the alleged constitutional invalidity of the statute in question. These cases are earlier and contrary to the decisions of the Supreme Court of the United States in similar situations hereinbefore cited at page 27 of this brief. For instance, it appears specifically in *Hartford Fire Ins. Co. v. Perkins*, 125 Fed. 502, that the lower court there followed the decision of *Doyle v. Continental Ins. Co.*, 94 U. S. 535, which was expressly overruled by subsequent decisions of the Supreme Court of the United States. (See *Terral v. Burke Construction Co.*, 257 U. S. 529.)

In *Douglas v. N. Y., N. H. & H. R. R. Co.*, 279 U. S. 377, the Court there found no discrimination in fact, inasmuch as the statute complained of, when properly interpreted, applied equally to citizens of the State of New York and to citizens of other States. The fact that a foreign corporation was involved in that case had nothing to do with the question of discrimination.

The Attempted Service of Process Upon Appellant Corporation by Leaving a Copy Thereof with the Assistant Secretary of State Does Not Constitute That Due Process of Law Required by Section 1 of the Fourteenth Amendment to the Constitution of the United States Where the Statute Does Not Name the Assistant Secretary of State as a Person Upon Whom Process May Be Served and Does Not Impose Upon Him Any Duty to Give Notice.

"Due process" under the Federal Constitution, means exact compliance with service statutes. No alleged constructive consent to service of process upon a specifically designated State officer can possible extend to service upon another or subordinate State officer. The law is clear that a service of process upon an officer not designated by the statute is insufficient to secure jurisdiction over the person of a defendant in the position of the appellant herein.

The City of Watertown v. Robinson, 69 Wis. 230;

Amy v. Watertown, 130 U. S. 301;

Simon v. Southern Ry. Co., 195 Fed. 56;

Lonkey v. Keyes Silver Mining Co., 21 Nev. 312;

Bennett v. Maccabees, 40 Wash. 431.

In *The City of Watertown v. Robinson*, 69 Wis. 230, the Supreme Court of Wisconsin used the following language which was afterwards approved and adopted by the Supreme Court of the United States in *Amy v. Watertown*, 130 U. S. 301, at 317:

> "When the statute prescribes a particular mode of service, that mode must be followed. *Ita lex scripta est.* There is no chance to speculate whether some other mode will not answer as well. This has been too often held by this court to require further citations. * * * When the statute designates a particular officer to whom the

process may be delivered, and with whom it may be left, as service upon the corporation, no other officer or person can be substituted in his place. * * * The designation of one particular officer upon whom service may be made excludes all others."

In *Riverside & D. R. Cotton Mills v. Menefee*, 237 U. S. 189, this Court held that proceedings in a court of justice to determine the rights and obligations of a corporation over which jurisdiction has not been acquired do not constitute due process of law and, that, the test of the right to acquire jurisdiction is the character and power of the person served as an agent of the corporation.

CONCLUSION.

It is a fundamental principle of our jurisprudence that every defendant in an action be entitled to sufficient notice thereof to assure it an opportunity of making a timely defense. A statute which permits a court to acquire jurisdiction over a defendant and to render a judgment through a service of process which begins and ends in a State office and which makes no provision, by any form of notice or service, for bringing to the attention of the defendant the fact that it has been sued, is clearly unconstitutional under the "due process" provision of Section 1 of the Fourteenth Amendment to the Constitution of the United States. Also, a service statute which dis-

criminates, in the matter of notice, between a foreign corporation having no agent in the State upon whom process can be served and a domestic corporation having no officer in the State upon whom process can be served, is unconstitutional under the "equal protection" provision of Section 1 of the Fourteenth Amendment to the Constitution of the United States. The "equal protection" provision may also be invoked when, as in the instant case, there is a substantial discrimination between one particular type of foreign corporation, like an insurance company, and a foreign investment corporation, like appellant herein.

Moreover, "due process" requires an exact compliance with the provisions of the service statute itself. The attempted service upon the Assistant Secretary of State of the State of Washington, who was neither named in the service statute as a person upon whom service could be made, nor required by the statute to give any notice to appellant of the fact of service, in no sense complies with the requirements of "due process."

For the several reasons hereinbefore stated, the said judgment of the Supreme Court of the State of Washington, dated December 2, 1932, should be re-

versed and a judgment ordered in favor of appellant and for costs.

Respectfully submitted,

ELMER E. TODD,
FRANK E. HOLMAN,
Counsel for Appellant.

WILLIAM M. ALLEN,
CLARENCE R. INNIS,
Of Counsel.

No. 663

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Supreme Court of the United States

October Term, 1932

THE STATE OF WASHINGTON on the relation of BOND & GOODWIN & TUCKER, INCORPORATED, a dissolved Delaware corporation,

Appellant,

v.

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SPOKANE COUNTY AND HONORABLE JOSEPH B. LINDSLEY, Judge thereof,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF OF APPELLEES

PARKER W. KIMBALL,
Counsel for Appellees.

A. W. WITHERSPOON,
H. T. DAVENPORT,
HERBERT W. ERSKINE,
Of Counsel.

Post Office Address:
1117 Old National Bank Building,
Spokane, Washington.

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Post Office Address:
1117 Old National Bank Building,
Spokane, Washington.

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v. *Appellant,*

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SPOKANE COUNTY AND HONORABLE JOSEPH B. LINDSLEY, Judge thereof,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF OF APPELLEES

STATEMENT OF THE CASE.

In considering the case the following facts should be borne in mind from the outset:

Bond & Goodwin & Tucker, Inc., a Delaware corporation, made application to be admitted to do business in the State of Washington, on April 9, 1926, and qualified to do business therein by filing the necessary certified copies of its articles of incorporation, paying license fee and appointing Duncan Shaw, of Seattle, Washington,

as its resident agent for the purpose of accepting service of process under the laws of that state. It did business in the State of Washington and was doing business in Spokane County in said State at the time these causes of action arose. This suit was brought by the plaintiff, as assignee of numerous persons, for damages arising from the sale by Bond & Goodwin & Tucker, Inc. of Vancouver Kraft Co., Ltd. bonds.

On or about November 29, 1929, said Bond & Goodwin & Tucker, Inc. withdrew from the State of Washington, ceased to transact any business therein, and on December 5, 1929, caused a formal notice of its withdrawal to be filed with the Secretary of State of the State of Washington. On or about said date said Bond & Goodwin & Tucker, Inc. was dissolved under the laws of the State of Delaware, and on December 11, 1929, a certificate of dissolution was issued by the Secretary of State of the State of Delaware. Duncan Shaw removed from the State of Washington to the State of California during the year 1929, and no one was appointed as statutory agent in his place subsequent to his removal from the State of Washington to California. The alleged fraud of Bond & Goodwin & Tucker, Inc. in the sale of bonds and upon which this suit is based was not discovered by any of the owners of such bonds until after May 15, 1931, and suit by reason of the alleged fraud of Bond & Goodwin & Tucker, Inc. was instituted in Spokane County in April, 1932.

ARGUMENT

SECTIONS OF STATUTE MUST BE CONSTRUED TOGETHER.

In order to properly construe Section 3854 of Remington's Compiled Statutes of Washington, under which the disputed service of process was made, it is necessary that Sections 3852 and 3853 be also borne in mind. These sections are set out in full (Appendix p. 1), and only the pertinent portions of said sections will be set out in the argument. Section 3852 reads in part as follows:

> "Any corporation incorporated under the laws of any state or territory in the United States, or of any foreign country, state, or colony, for any of the purposes for which domestic corporations are authorized to be formed under the laws of this state, shall have full power and is hereby authorized to sue and to be sued in any court having competent jurisdiction, to acquire, purchase, hold, mortgage, sell, convey, or otherwise dispose of, in the corporate name, all real estate or personal property necessary or convenient to carry into effect the objects and purposes of its corporation, and also any interest in real estate, by mortgage or otherwise do (due) to or loans made by such foreign corporations within the boundaries of this state, either prior to or after the passage of this act, and generally do and perform every act and transact every kind of business within this state in the same manner and to the same extent as corporations incorporated and organized under the laws of this state are authorized to do under the laws of this state, by a compliance with all the conditions prescribed by the next two

> succeeding sections of this chapter: Provided, however, that this chapter shall not be (so) construed as to allow such foreign corporation to transact business within the state on more favorable conditions than are prescribed by law for a similar corporation organized under the laws of this state."

"The next two succeeding sections of this chapter" referred to in Section 3852, have the following provisions:

Section 3853 requires the filing of a certified copy of the articles of incorporation of the foreign corporation.

Section 3854 provides for the appointment of an agent for the purpose of *"accepting service of process"* in any action or suit pertaining to the property, business or transactions of the corporation within the state in which such corporation may be a party. That section further provides: "And such corporation shall have and keep continually some resident agent empowered as aforesaid during all the time such corporation shall conduct or carry on any business within this state, and service of any process, pleading, notice or other paper *"shall be taken and held as due service on such corporation."* Such corporation may change its agent or its principal place of business from time to time by filing and recording with the Secretary of State a new appointment, stating the change of such agent or the change of the principal place of business; and in the event such foreign corporation shall withdraw from this state and cease to

transact business therein it shall continue to keep and maintain such agent within the state upon whom service of process may be made until the statute of limitations shall have run against anyone bringing an action against such corporation, which accrued prior to its withdrawal from the state. It further provides that if the corporation should revoke the authority of its designated agent after its withdrawal and prior to the time when the statute of limitations would have run against causes of action, then in that event service of process may be had upon the Secretary of State of the State of Washington which *"shall be held as due and sufficient service upon such corporation."*

What is the purpose of that statute? It is to prevent foreign corporations doing business in the state withdrawing and failing to name some person on whom service might be had upon causes of action arising from its transactions within the state. (No contention was made by appellant in the Supreme Court of Washington, or has been made elsewhere, that the causes of action involved herein did not arise in the State of Washington while appellant was doing business in the State.)

FOREIGN CORPORATION BY COMPLYING WITH STATUTE, ENTERS INTO CONTRACT WITH STATE FOR BENEFIT OF PERSONS HAVING TRANSACTIONS WITH SUCH CORPORATION.

Under the statute before a foreign corporation can legally enter the state to transact business therein it has to comply with the conditions of these three sections. After entering the state by filing its articles of incorporation and appointing a statutory agent for the purpose of accepting process, and receiving a license as such foreign corporation, it is permitted to engage in business therein under the terms stated in Section 3854.

What was the consideration passing from the corporation in return for the right to be permitted to engage in business therein? Not alone the license fee paid at the time of filing its articles, and the annual license fee while doing business therein. The more important consideration was its agreement to "keep continually some resident agent empowered as aforesaid (that is, to accept service) during all the time such corporation shall conduct or carry on business within the state, and service of any process, pleading or notice shall be taken and held as due service on such corporation"; and its further agreement that if such corporation shall withdraw from this state and cease to transact business therein, to continue, and keep and maintain such agent within the state upon whom service of process, pleadings and papers may be made until the statute of limitations shall have run

against any causes of action which accrued prior to its withdrawal from the state.

But that is not all of its contract. It further agreed that in case it should revoke the authority of its agent after its withdrawal, and prior to the time when the statute of limitations would have run against causes of action accruing against it, *"then in that event service of process, pleadings and papers may be made upon the Secretary of State of the State of Washington, and the same shall be held as due and sufficient service upon such corporation."* In other words, it agreed that it would keep a statutory agent until all causes of action had outlawed against it. The obligation and effect of its contract was that it would name the statutory agent itself, or in case of its failure to do so, under its contract with the State, the Secretary of State would become such statutory agent.

While the corporation was engaged in business in Washington its failure to name a new statutory agent was not vital, for service could be had upon "any agent, cashier or secretary thereof."

Sec. 226 Remington's Compiled Statutes of Washington.

In other words, it is our position that upon Duncan Shaw's removal from the State, the Secretary of State became the statutory agent.

One of the interesting cases upon this point is that

of *Western Grocer Co. v. N. Y. Oversea Co.*, 206 Fed. 270. This was a suit by an Iowa corporation against a New York corporation in a California court, for damages for breach of contract, entered into and to be performed in California. At the time of the contract, defendant was qualified to do business in California and had appointed a local resident for service. At the time of the suit, the agent appointed had been withdrawn and service was made on the secretary of state, in accordance with the provisions of the California statute. In sustaining the validity of the service, the court said:

> "'It is at once apparent that, to permit a corporation to accept the benefits of this statute, and, after it had entered into contracts, to evade jurisdiction by withdrawing its agent, would be in the highest degree inequitable and unjust. * * *
>
> "Having accepted those conditions, to use the language of *Davis v. Kansas & T. Coal Co.* (C.C.), 129 F. 149, 'that section of the statute became in the nature of a contract between the company and the state.' In my opinion, it becomes more than that. I think it becomes a part of every contract which the corporation may make within the state, and which is to be performed within the state. In other words, I believe that, when defendant complied with the provisions of the California statute, those provisions are to be read into all of its contracts here, and one of those provisions is that, in the event of its withdrawal from the state, service of process can be made upon the officer provided by statute.'"

It is very interesting to note in the recent case of *King v. American Tank & Equipment Corporation*, 144

So. p. 283, (decided Nov. 11, 1932), that the Western Grocer case was referred to, and the following pertinent language was used:

> "A state has the power, if she allows a corporation to enter her confines, to determine the condition on which the entry shall be made and the right to enforce any condition so imposed. The power to exclude embraces the power to regulate, and the power to enact and enforce such regulations.
>
> "(3) When a foreign corporation undertakes to transact business in a state other than that in which it is incorporated, it submits itself to the authority of the courts of such other state and is bound by the statutory provisions respecting the method of such courts obtaining jurisdiction over it. *United Oil & Natural Gas Prod. Corp. v. United Carbon Corp.*, 171 La. 374, 131 S. 52."

There is no difference in principle between the facts in the case at bar and *Penn. Fire Ins. Co. v. Gold Issue Mining Co.*, 243 U. S. 93, cited by appellant and referred to later. In the Penn. Fire Ins. Co. case the consent to have the insurance commissioner act as statutory agent, was in writing and filed at the time the corporation was permitted to commence business in the state. In the case at bar the contract was entered into by virtue of filing the certified copies of appellant's articles of incorporation and appointing an agent under Sec. 3854. All of Sec. 3854 became a part of the contract between appellant and the State of Washington.

Such stipulations are recognized by several of the decisions of this Court as being contractual.

In *Mutual Reserve Life Insurance Co. v. Phelps*, 190 U. S. 147, the Court used the following language:

> "This and other kindred statutes enacted in various States indicate the purpose of the State that foreign corporations engaging in business within its limits shall submit the controversies growing out of that business to its courts, and not compel a citizen having such a controversy to seek for the purpose of enforcing his claims the State in which the corporation has its home. Many of those statutes simply provided that the foreign corporation should name some person or persons upon whom service of process could be made. The insufficiency of such provision is evident, for the death or removal of the agent from the State leaves the corporation without any person upon whom process can be served. In order to remedy this defect some States, Kentucky among the number, have passed statutes, like the one before us, providing that the corporation shall consent that service may be made upon a permanent official of the State, so that the death, removal or change of officer will not put the corporation beyond the reach of the process of the courts. It would obviously thwart this purpose, if this association, having made, as the testimony shows it had made, a multitude of contracts with citizens of Kentucky, should be enabled, by simply withdrawing the authority it had given to the insurance commissioner, to compel all these parties to seek the courts of New York for the enforcement of their claims."

In *Hunter v. Mut. Reserve Life Ins. Co.*, 218 U. S. 573, the Court used the following language:

> "This general language must be considered in reference to the case, a conclusion which is justified

by the decision of the court in *Moore v. Mutual Reserve*, 129 N. C. 31, where it is said that the State, having the right to prescribe the terms upon which the insurance company might carry on its business in the State, and the company, 'being permitted, proceeded to make contracts with the citizens of the State, and became liable to them under these contracts. One of the provisions upon which the defendant was allowed to do business here was that James R. Young, insurance commissioner, and his successors in office should be constituted its agent, upon whom service of process might be made, and that said agency should continue so long as the defendant had any liabilities remaining unsatisfied in this State arising from or out of its said business of insurance.' "

In the case of *Davis v. Kansas & Texas Coal Co.*, 129 Fed. 149 (Circuit Court W. D. Arkansas) the Court was construing the statute of Arkansas which was an amendment to the former statute, the terms of which amendment provided that in case the foreign corporation had failed to designate an agent upon whom process might be served, and who did not have an officer continuously residing in the state upon whom process might be served, service might be had upon the State Auditor, and that such service should be sufficient to give jurisdiction over the foreign corporation. The Court said:

"Up to the passage of this act a foreign corporation doing business in the state might, at its pleasure, cease to do business in the state, recall its agents, and revoke the authority conferred under the acts above referred to upon a citizen of the state upon

whom service could be made; and, this being done, no suit could be brought against it in the state. If the same is true under the provisions of the act of February 26th, to which I have just referred, what was the object and purpose of the provision authorizing service to be made upon the Auditor? The company could not withdraw the agency of the Auditor, because that was conferred by the terms of the statute, and when it did business in the state after the passage of the act of February 26, 1901, that section of the statute became in the nature of a contract between the company and the state, to the effect that service might be had upon the Auditor of State in all cases where suits accrued against the company while doing business within the state; and it is beyond the power of the defendant company to revoke that provision of the statute."

In the case of *Simon v. Southern Railway Company*, 236 U. S. 115, the Court used the following language:

"Subject to exceptions, not material here, every State has the undoubted right to provide for service of process upon any foreign corporations doing business therein; to require such companies to name agents upon whom service may be made; and also to provide that in case of the company's failure to appoint such agent, service, in proper cases, may be made upon an officer designated by law. *Mutual Reserve Ass'n v. Phelps*, 190 U. S. 147; *Mutual Life Ins. Co. v. Spratley*, 172 U. S. 603. But this power to designate by statute the officer upon whom service in suits against foreign corporations may be made relates to business and transactions within the jurisdiction of the State enacting the law."

NO CONSTITUTIONAL RIGHT OF APPELLANT WAS VIOLATED.

Appellant entered into a contract with the State of Washington to do certain things, that is, to maintain a statutory agent until all claims had outlawed, or in case of its failure, to have the Secretary of State act as its agent.

No constitutional privilege was thereby violated. Under the facts in this case the Secretary of State became appellant's agent. It had contracted to that condition. It knew it had been doing business in Washington, and that someone with whom it had dealings might see fit to sue by reason thereof. There was nothing to prevent appellant's requesting the Secretary of State to forward any process served upon it through him to its home office or turn it over to local counsel.

Assume that while Duncan Shaw was its statutory agent, suit had been brought against the appellant, that process had been served on Shaw and that he had failed to forward the process. Appellant could not have claimed that there had not been due service of process. Appellant is in no better position now to claim that there has not been due process, for at the time of service in the case at bar the Secretary of State was its statutory agent.

When appointing Shaw appellant had contracted that service of process on him would *be taken and held as due service* and had also agreed that under the facts

herein shown, service of process on the Secretary of State would be *taken and held as due and sufficient service*. There is no distinction. Under the provisions of the statute that official was appellant's statutory agent.

This case is vastly different from one in which the foreign corporation is *compelled*, as a condition of doing business in the State, to name a state official as its statutory agent. When Duncan Shaw moved from the State appellant still had its option to appoint someone else in his place, or if it saw fit, to have the Secretary of State act as its agent. It accepted this last option.

This factor of choice whereby the corporation in its own discretion might have appointed its own agent instead of submitting to the statutory appointment of the state officer effectively distinguishes the condition in question from such unconstitutional conditions as those limiting the right to sue in the Federal Courts,

Terrall v. Burke Construction Co., 257 U. S. 529;

or those burdening the property or business of the corporation outside the State.

Western Union Telegraph Co. v. Kansas, 216 U. S. 1;

Fidelity Deposit Co. v. Tafoya, 270 U. S. 426;

Frost v. Railroad Commission, 271 U. S. 583;

Hanover Fire Insurance Co. v. Carr, 272 U. S. 494;

Cudahy Packing Co. v. Hinkle, 278 U. S. 460.

SERVICE UPON SECRETARY OF STATE UNDER FACTS IN THIS CASE CONSTITUTES "DUE PROCESS OF LAW."

Appellant has defined "due process of law" as requiring "notice of some character reasonably calculated to bring home to a defendant the fact that an action has been commenced and the character thereof."

With this definition we find no fault. Applying it to the facts in this case, wherein has the notice given failed to measure up to that definition? Assuredly, some duty rested upon appellant to protect itself, and all it had to do was to notify the Secretary of State to forward any papers served, either to its home office or to any counsel selected by it.

Justice Taft, in the case of *Wuchter v. Pizzutti,* in discussing what constitutes due process, used the following language:

> "These cases and others indicate a general trend of authority toward sustaining the validity of service of process, if the statutory provisions in themselves indicate that there is reasonable probability that if the statutes are complied with, the defendant will receive actual notice, and that is the principle that we think should apply here."

The mere fact that a defendant was taken by surprise does not deprive the defendant of due process of law.

> *Penna. Fire Ins. Co. v. Gold Issue Mining Co.,* 243 U. S. 93.

APPELLANT'S CASES DISTINGUISHED AS TO FACT AND PRINCIPLES OF LAW.

Appellant relies principally upon the cases of *Wuchter v. Pizzutti*, 276 U. S. 13, and *Consolidated Flour Mills Co. v. Muegge*, 278 U. S. 559.

The case of *Wuchter v. Pizzutti* was a suit against a non-resident motorist. The right of states to enact laws governing cases of that character is clearly under the police power. Having in mind the distinction between such cases and cases of foreign corporations, Justice Taft said:

> "The cases, in which statutes have been upheld providing that non-resident corporations may properly be served by leaving a summons with a state official, where the corporation has not indicated a resident agent to be served, are not especially applicable to the present statute. *Pennsylvania Fire Insurance Co. v. Gold Issue Mining Co.*, 243 U. S. 93; *Simon v. Southern Ry. Co.*, 236 U. S. 115; *Old Wayne Mutual Life Association v. McDonough*, 204 U. S. 8. Such corporations may properly be required to accept service through a public officer as a condition of their doing business in the state. Their knowledge of the statutory requirement may perhaps prompt frequent inquiry as to suits against them, of their appointed agent or at the office of the public official to be served, but it could hardly be fair or reasonable to require a non-resident individual owner of a motor vehicle who may use the state highways to make constant inquiry of the Secretary of State to learn whether he has been sued. Even in cases of non-resident corporations, it has been held that a statute

directing service upon them by leaving process with a state official is void if it contains no provision requiring the official, upon whom the service may be made, to give the foreign corporations notice that suit has been brought and citation served. *Southern Railway Co. v. Simon*, 184 Fed. 959, 961; *Gouner v. Missouri Valley Bridge Co.*, 123 La. 964."

In support of the last part of the above quotation, the cases of *Simon v. Southern Ry.* and *Gouner v. Mo. Valley Bridge Co.* are cited. These two cited cases do not however bear out the general principle stated. In *Simon v. Southern Ry.* defendant was not doing business in Louisiana, and the suit was for tort committed in the State of Alabama. Justice Lamar, in deciding the case, spoke as follows:

"The broader the ground of the decision here, the more likelihood there will be of affecting judgments held by persons not before the court. We therefore purposely refrain from passing upon either of the propositions decided in the courts below, and without discussing the right to sue on a transitory cause of action and serve the same on an agent voluntarily appointed by the foreign corporation, we put the decision here on the special fact, relied on in the court below, that in this case the cause of action arose within the State of Alabama, and the suit therefor, in the Louisiana Court, was served on an agent designated by a Louisiana statute. * * * The service on the Southern Railway, even if in compliance with the requirements of Act 54, was not that kind of process which could give the court jurisdiction over the person of the defendant for a cause of action arising in Alabama."

This distinction had previously been made in the case of *Penna. Fire Ins. v. Gold Issue Mining Co.,* 243 U. S. in which Justice Holmes used the following expression:

> "The defendant relies upon *Old Wayne Mutual Life Association v. McDonough,* 204 U. S. 8, and *Simon v. Southern Railway Co.,* 236 U. S. 115. But the distinction between those cases and the one before us is shown at length in the judgment of the court below, quoting a brief and pointed statement in *Smolik v. Philadelphia & Reading Coal & Iron Co., 222* Fed. Rep. 148; a statement reinforced by Cardozo, J., in *Bagdon v. Philadelphia & Reading Coal & Iron Co.,* 217 N. Y. 432. In the above mentioned suits the corporations had been doing business in certain States without authority. They had not appointed the agent as required by statute, and it was held that service upon the agent whom they should have appointed was ineffective in suits upon causes of action arising in other States. The case of service upon an agent voluntarily appointed was left untouched. 236 U. S. 129, 130. If the business out of which the action arose had been local it was admitted that the service would have been good, and it was said that the corporation would be presumed to have assented."

The case of *Gouner v. Missouri Valley Bridge Co.,* cited by Justice Taft, construed act No. 54 of the State of Louisiana of the year 1904. That act dealt with the appointment of agents by foreign corporations, but did not require foreign corporations to maintain agents within the state after permanently withdrawing therefrom. This is clearly brought out in the case of *King v. Am.*

Tank & Equipment Company, 144 So. 283, referred to above.

The decision in the case of *Consolidated Flour Mills Co. v. Muegge* was "Per Curiam" with this brief statement. "Reversed on authority of *Wuchter v. Pizzutti*, 276 U. S. 13."

The facts in this last case are that the Consolidated Flour Mills *was never authorized to do business* in the state of Oklahoma, but was doing business there in violation of law.

The Supreme Court of Oklahoma in that case makes the following pertinent remark:

> "The defendant had not obtained authority to do business in the State of Oklahoma and had not designated an agent upon whom service of process could be made."
>
> *Consolidated Flour Mills Co. v. Muegge*, 127 Okla. 295, 260 Pac. 745.

The distinction is clear. There was no element of contract between the Consolidated Flour Mills and the State of Oklahoma.

The case of *Knapp v. Bullock Tractor Co.*, 243 Fed. 543, relied upon by appellant is also easily distinguished. The defendant in that case had never been authorized to engage in business in California, and the large part of the opinion is taken up in determining whether defendant was in fact engaged in doing business there. The same reasoning applies as applies to the Muegge case.

Justice Harlan, in deciding the Old Wayne Life Ass'n case, made the following concise statement of the law:

> "Conceding then that by going into Pennsylvania, without first complying with its statute, the defendant association may be held to have assented to the service upon the Insurance Commissioner of process in a suit brought against it there in respect of business transacted by it in that Commonwealth, such assent cannot properly be implied where it affirmatively appears, as it does here, that the business was not transacted in Pennylvania. Indeed, the Pennsylvania statute, upon its face, is only directed against insurance companies who do business in that Commonwealth—'in this State.' While the highest considerations of public policy demand that an insurance corporation, entering a State in defiance of a statute which lawfully prescribes the terms upon which it may exert its powers there, should be held to have assented to such terms as to business there transacted by it, it would be going very far to imply, and we do not imply, such assent as to business transacted in another State, although citizens of the former State may be interested in such business."

SERVICE ON ASSISTANT SECRETARY OF STATE HELD UNDER DECISION OF SUPREME COURT OF WASHINGTON TO BE SUFFICIENT COMPLIANCE WITH STATUTE AND HENCE QUESTION NOT OPEN.

Appellant contends that service of summons and complaint on the Assistant Secretary of State is not a compliance with statute. We do not feel that appellant is in any position to make such contention.

First. In the transcript of the record (P. 7-8) is shown a Sheriff's return of service, showing service to have been made upon A. M. Kitto, Assistant Secretary of State. In the same transcript (P. 14-15) is shown an affidavit of J. Grant Hinkle, Secretary of State, showing that the service was in fact made upon him. This affidavit was used by appellant in its application to the Supreme Court of Washington for a writ of prohibition. Appellant cannot successfully contend that service was made upon the Assistant Secretary, while by its own record, it shows that it was in fact made upon the Secretary of State.

Second. That contention was made in the Supreme Court of Washington. Section 10995 Remington's Compiled Statutes of Washington reads as follows:

> "The secretary of state may have one assistant secretary of state to be appointed by him in writing, and to continue during his pleasure. Such assistant secretary of state to have the power to perform any act or duty relating to the secretary of state's office, that the secretary of state has, and the secretary of state shall be responsible for the acts of said assistant."

Upon a consideration of the question, the Supreme Court held that the service of process, under the provisions of Section 3854 and Section 10995, was a sufficient compliance with the statute.

> *State ex rel Bond & Goodwin & Tucker, Inc. v. Superior Court*, 169 Wash. 688 (p. 697).

That does not leave a constitutional question open.

The Supreme Court is bound by the decision of the court of last resort upon the question of the construction of a statute.

St. Louis Southwestern Ry. v. Arkansas, 235 U. S. 350;
Penna. Fire Ins. Co. v. Gold Issue Mining Co., 243 U. S. 93;
Wick v. Chelan Electric Co., 280 U. S. 108;
Concordia Ins. Co. v. School Dist., 282 U. S. 545;
Mass. Bonding Co. v. Concrete Steel Bridge Co., 37 Fed. Rep. (2nd) 695.

NO DISCRIMINATION UNDER DIFFERENT SECTIONS OF WASHINGTON STATUTES RELATIVE TO MANNER OF SERVICE.

Some contention is made that there is a discrimination against appellant, due to the difference in manner of service upon domestic corporations where officers cannot be found, and foreign insurance corporations, by which these two classes are favored over foreign corporations which have withdrawn from the state and failed to name a statutory agent for service of process.

Even though a statute causes a diversity of treatment of corporations or individuals it is not repugnant to the constitutional guaranty of "equal protection" as long as there is a reasonable ground for such diversity of treatment. Hence a statute, bearing alike on all corporations of each class in like conditions, does not deny the equal protection of the law as long as such classification is not arbitrary and is reasonable.

The principle is well defined in the case of *Power Co. v. Saunders,* 274 U. S. 490 (cited by appellant) wherein the Court uses the following language:

> "The clause in the Fourteenth Amendment forbidding a State to deny to any person within its jurisdiction the equal protection of the laws is a pledge of the protection of equal laws., *Truax v. Corrigan,* 257 U. S. 312, 333; *Atchison, Topeka & Santa Fe Ry. Co. v. Vosburg,* 238 U. S. 56, 59, and extends as well to corporate as to natural persons, *Smyth v. Ames,* 169 U. S. 466, 522; *Gulf, Colorado & Santa Fe Ry. Co. v. Ellis,* 165 U. S. 150, 154; *Santa Clara County v. Southern Pacific R. R. Co.,* 118 U. S. 394, 396. It does not prevent a state from adjusting its legislation *to differences in situation or* forbid classification in that connection; but it does require that the classification *be not arbitrary* but based on a real and substantial difference having a reasonable relation to the subject of the particular legislation."

A well considered case upon that point is *National Union Fire Ins. Co. v. Wanberg,* 260 U. S. 71. Here a statute of North Dakota, regulating companies engaged in hail insurance was assailed, on the ground that it denied to such companies the equal protection of the laws.

Justice Taft, in upholding the statute, said:

> "The statute applies to all companies engaged in such insurance. There is no discrimination and no denial of the equal protection of the laws. The fact that the time requirements of the statute may bear more heavily on foreign companies whose principal

offices may be far removed than upon those whose headquarters are within the State is a circumstance necessarily incident to their conduct of business in another State of which they can not complain. They can not expect the laws of the State to be bent to accommodate them as a matter of strict legal right, however wise it may be for a legislature to give weight to such a consideration in securing the use of foreign capital for its people. Moreover, as the business of such insurance companies is purely intrastate, *New York Life Insurance Co. v. Deer Lodge County*, 231 U. S. 495, the State has power to require them to accept conditions different from those imposed on domestic corporations (*Paul v. Virginia*, 8 Wall 168; *Hooper v. California*, 155 U. S. 648, and cases cited) though this is not, of course, unlimited. *Terral v. Burke Construction Co.*, 257 U. S. 529, 532, 533."

Tested by the rule announced it can not be said that these statutes are unreasonable or arbitrary. They deal with all corporations in the same class equally.

It would be just as reasonable for a foreign insurance company to contend that it was denied "equal protection" because it has no option under the statute in naming an agent for the service of process, but must name the Insurance Commissioner. A domestic corporation is not required to name a statutory agent, it does not withdraw from the state, and the mailing of summons to last known address is not more reasonably calculated to give notice of the pendency of the suit than the service upon the Secretary of State was in case of appellant.

The cases cited by appellant under this head are clearly distinguishable. In the first case of

Kentucky Finance Corp. v. Paramount Auto Exchange, 262 U. S. 544,

the statute involved required a foreign corporation, as a condition to the maintenance of its action, to send an officer with its papers and books bearing upon the matter in controversy from its domicile to the state where the action is brought, in order to submit to an adversary examination before answer, but did not subject non-resident individuals to such examination.

The Court in its decision uses the following language:

> "Here the statute authorized the imposition, and there was imposed, on the plaintiff a highly burdensome requirement because of its corporate origin,—a requirement which under the statute could not be laid on an individual suitor in the same situation. The discrimination was essentially arbitrary. There could be no reason for requiring a corporate resident of Louisville to send its secretary, papers, files and books to Milwaukee for the purposes of an adversary examination that would not apply equally to an individual resident of Louisville in a like case. The discrimination is further illustrated by the provision that as to all residents of Wisconsin, individual and corporate, the examination should be had in the county of their residence, no matter what its distance from the place of suit."

In the case of *Power Mfg. Co. v. Saunders,* 274 U. S. 490, the statute of Arkansas restricted the venue in

transitory actions, if against a domestic corporation, to the county of its place of business, or in which its chief officer resides; if against a natural person, to the county where he resides or is found; if against a foreign corporation to any county of the state.

The Court rests its decision in the following language:

> "Of course the restricted venue as to domestic corporations and individuals is prompted by considerations of convenience and economy; but these considerations have equal application to foreign corporations. So far as the plaintiffs in such actions are affected, it is apparent that there is no more reason for a statewide venue when the action is against a foreign corporation than when it is against a domestic corporation or a natural person. So we conclude that the special classification and discriminatory treatment of foreign corporations are without reasonable basis and essentially arbitrary."

Clearly those provisions were unreasonable and arbitrary.

CONCLUSION.

From the foregoing it is our contention that the section of the statute assailed is not in violation of the Fourteenth Amendment to the Federal Constitution; that, upon the facts shown, the service upon appellant through the Secretary of State, was such as to constitute "due service of process"; and that there is nothing in the statute which denies to appellant "equal protection."

For the reasons set forth the judgment of the Supreme Court of Washington should be affirmed.

Respectfully submitted,

PARKER W. KIMBALL,
Counsel for Appellees.

A. W. WITHERSPOON,
H. T. DAVENPORT,
HERBERT W. ERSKINE,
Of Counsel.

APPENDIX.

Sec. 3852. Power of, to Do Business in This State.

Any corporation incorporated under the laws of any state or territory in the United States, or of any foreign country, state, or colony, for any of the purposes for which domestic corporations are authorized to be formed under the laws of this state, shall have full power and is hereby authorized to sue and to be sued in any court having competent jurisdiction, to acquire, purchase, hold, mortgage, sell, convey, or otherwise dispose of, in the corporate name, all real estate or personal property necessary or convenient to carry into effect the objects and purposes of its corporation, and also any interest in real estate, by mortgage or otherwise do (due) to or loans made by such foreign corporations within the boundaries of this state, either prior to or after the passage of this act, and generally do and perform every act and transact every kind of business within this state in the same manner and to the same extent as corporations incorporated and organized under the laws of this state are authorized to do under the laws of this state, by a compliance with all the conditions prescribed by the next two succeeding sections of this chapter: Provided, however, that this chapter shall not be (so) construed as to allow such foreign corporation to transact business within the state on more favorable conditions than are prescribed by law for a similar corporation organized under the laws of this state: And provided further, that no corporation, the majority of the capital stock of which is owned by aliens other than those who in good faith have declared their intention to become citizens of the United States, shall acquire the ownership of any lands in this state other than lands containing valuable deposits of minerals, metals, iron, coal, or fireclay, and the necessary land for

mills and machinery to be used in the development thereof, and the manufacture of the products therefrom, except where acquired under mortgage, or in good faith in the ordinary course of justice in the collection of debts: Provided, further, that no foreign corporation which is hereafter organized which has among its other powers the business of dealing in real estate, and buying and selling the same, and for the purpose of carrying on a real estate brokerage business, shall be permitted to transact such business of buying and selling and dealing in real estate, and carrying on a brokerage business therein in this state; but this prohibition shall not extend to any other business for the transaction of which such corporation may be organized.

Sec. 3853. Certified Copy of Charter, etc., to be Filed and Recorded.

Such corporations shall cause to be filed and recorded in the office of the secretary of state a certified copy of its charter, articles of incorporation, memorandum of association, or certificate of incorporation, certified to by the officer who is the custodian of the same according to the laws of the state or territory, country or colony, where such corporation is incorporated, or who is authorized to issue certificates of incorporation according to the laws of such state, territory, or foreign country or colony. The instruments herein required to be filed and recorded shall be attested by such certifying officer under his hand and seal of office, which attestation shall be prima facie proof of the facts therein stated, and of the genuineness of the certificate. If such officer has no official seal, his certificate shall state that fact over his signature, and thereupon the secretary of state, or of the territory, in case of corporations within the United States, and the consul general, consul, vice-consul, deputy consul, consular agent, or commercial agent of the Uni-

ted States, at or nearest to the place where such certificate is made, in the case of corporations not within the United States, shall certify under his hand and seal of office to the genuineness of the signature of the officer making the certificate, and to the fact that at the time of making such certificate the person making the same held the office described in the certificate.

Sec. 3854. Appointment of Agent to be Filed and Recorded.

Such corporations shall also constitute and appoint an agent, who shall reside at the place in the state where the principal business of the corporation is to be carried on, to be designated as hereinafter required. Such appointment shall be in writing, signed by the president or chief officer of such corporation, and shall be attested by its corporate seal, and shall contain the name of the agent, his place of residence and the place where the principal business of such corporation is be carried on, and shall authorize such agent to accept service of process in any action or suit pertaining to the property, business or transactions of such corporation within this state in which such corporation may be a party. The signature of such president or chief officer, attested by the corporate seal to such written appointment, shall be sufficient proof of the appointment of such agent. Such appointment, when duly executed, shall be filed for record in the office of the secretary of state by such corporation, and shall be there recorded; and such corporation shall have and keep continually some resident agent, empowered as aforesaid during all the time such corporation shall conduct or carry on any business within this state, and service of any process, pleading, notice or other paper shall be taken and held as due service on such corporation. Such corporation may change its agent or its principal place of business, from time to time, by filing and

recording with the secretary of state a new appointment, stating the change of such agent or the change in the principal place of business; and in the event such foreign corporation shall withdraw from this state and cease to transact business therein it shall continue to keep and maintain such agent within this state upon whom service of process, pleadings and papers may be made, until the statute of limitations shall have run against anyone bringing an action against said corporation, which accrued prior to its withdrawal from this state. In case said corporation shall revoke the authority of its designated agent after its withdrawal from this state and prior to the time when the statutes of limitations would have run against causes of action accruing against it, then in that event service of process, pleadings and papers in such actions may be made upon the secretary of state of the state of Washington, and the same shall be held as due and sufficient service upon such corporation.

SUPREME COURT OF THE UNITED STATES.

No. 663.—October Term, 1932.

The State of Washington *ex rel.* Bond & Goodwin & Tucker, Incorporated, a dissolved Delaware corporation, Appellant, *vs.* Superior Court of the State of Washington for Spokane County and Honorable Joseph B. Lindsley, Judge thereof.	Appeal from the Supreme Court of the State of Washington.

[May 8, 1933.]

Mr. Justice Roberts delivered the opinion of the Court.

This is an appeal from a final decree of the Supreme Court of the State of Washington refusing a writ of prohibition to prevent the further prosecution of an action pending in the Superior Court of Spokane County.

Bond & Goodwin & Tucker, a Delaware corporation, qualified in 1926 to do business in the State of Washington pursuant to the applicable statute.* One Duncan Shaw, of Seattle, was appointed resident agent for the acceptance of service of process, as the law required. In 1929 the company withdrew from the State, ceased to transact business there, and filed formal notice of withdrawal with the Secretary of State. The corporation was dissolved in accordance with the laws of Delaware, but the appointment of Shaw as statutory agent was never revoked. In 1929 he removed to California. In 1932 one Monroe commenced a civil action in the Superior Court, naming Bond & Goodwin & Tucker as one of the defendants, and instructed the sheriff to serve the summons and complaint upon the Secretary of State. The return and proof of service show that this was done by handing the papers to an assistant Secretary. Neither the summons and complaint nor any copy of them, nor any notice touching the same, were forwarded to Bond & Goodwin & Tucker by the Secretary of State or anyone else. No other form of service was made.

*Section 3854, Remington's Compiled Statutes, 1922.

The appellant appeared specially and moved to quash the service. The motion was overruled. Thereupon application was made to the Supreme Court of the State for a writ of prohibition. The present appeal is from the judgment refusing the writ.

The appellant urges that the statute denies the due process and equal protection guaranteed by the Fourteenth Amendment. The first contention rests upon the fact that substituted service upon the Secretary of State is validated without any requirement that he shall give the defendant notice of the pendency of the action; the second is bottomed upon the circumstance that a different procedure requiring the Secretary of State to send notice to defendants is prescribed as respects suits against domestic corporations having no office within the State, and foreign insurance companies.

The statute requires a foreign corporation to appoint and register a resident agent empowered to accept service of process in any action or suit pertaining to the property, business or transactions of such corporation within the State. The agent may be changed by filing with the Secretary of State a new appointment. The portion of the Act which gives rise to the present controversy is:

". . . in the event such foreign corporation shall withdraw from this state and cease to transact business therein it shall continue to keep and maintain such agent within this state upon whom service of process, pleadings and papers may be made, until the statute of limitations shall have run against anyone bringing an action against said corporation, which accrued prior to its withdrawal from this state. In case said corporation shall revoke the authority of its designated agent after its withdrawal from this state and prior to the time when the statutes of limitations would have run against causes of action accruing against it, then in that event service of process, pleadings and papers in such actions may be made upon the secretary of state of the state of Washington, and the same shall be held as due and sufficient service upon such corporation."

We are told that when the appellant appointed Shaw and registered him as its agent to accept service, it had complied with all conditions requisite to its lawful transaction of business within the State; that the provision for another sort of substituted service in the event of Shaw's removal from the State, or the revocation of his appointment without registration of another agent, is permissible only if it requires notice to the defendant; that by qualifying as a foreign corporation appellant did not consent to

the arbitrary and unconstitutional condition that it might be cast in judgment without notice of suit. We think, however, that the position is unsound.

The State need not have admitted the corporation to do business within its borders. *Bank of Augusta* v. *Earle*, 13 Pet. 519; *Lafayette Insurance Co.* v. *French*, 18 How. 404, 407. Admission might be conditioned upon the requirement of substituted service upon a person to be designated either by the corporation, *St. Clair* v. *Cox*, 106 U. S. 350, 356, or by the State itself, *Mutual Reserve Assn.* v. *Phelps*, 190 U. S. 147, 158, or might, as here, be upon the terms that if the corporation had failed to appoint or maintain an agent service should be made upon a state officer, *American Railway Express Co.* v. *Royster Co.*, 273 U. S. 274, 280. The provision that the liability thus to be served should continue after withdrawal from the State afforded a lawful and constitutional protection of persons who had there transacted business with the appellant. *American Railway Express Co.* v. *Kentucky*, 273 U. S. 269, 274.

It has repeatedly been said that qualification of a foreign corporation in accordance with the statutes permitting its entry into the State constitutes an assent on its part to all the reasonable conditions imposed. *Lafayette Insurance Company* v. *French*, *supra*, 408; *St. Clair* v. *Cox*, *supra*, 356; *Connecticut Mutual Life Insurance Co.* v. *Spratley*, 172 U. S. 602, 614; *Old Wayne Mut. Life Assn.* v. *McDonough*, 204 U. S. 8, 22; *Commercial Mutual Accident Co.* v. *Davis*, 213 U. S. 245, 254. It is true that the corporation's entry may not be conditioned upon surrender of constitutional rights, as was attempted in the cases on which the appellant relies. *Terral* v. *Burke Construction Co.*, 257 U. C. 529; *Fidelity & Deposit Co.* v. *Tafoya*, 270 U. S. 426; *Frost Trucking Co.* v. *Railroad Commission*, 271 U. S. 583; *Hanover Fire Insurance Co.* v. *Harding*, 272 U. S. 494. And for this reason a State may not exact arbitrary and unreasonable terms respecting suits against foreign corporations as the price of admission, *Power Mfg. Co.* v. *Saunders*, 274 U. S. 490. But the statute here challenged has no such operation. It goes no further than to require that the corporation may be made to answer just claims asserted against it according to law. By appointing a new agent when Shaw ceased to be a resident of the State the appellant could have assured itself of notice of any action. The statute informed the company that if it elected not

to appoint a successor to Shaw the Secretary of State would by law become its agent for the purpose of service. The burden lay upon the appellant to make such arrangement for notice as was thought desirable. There is no denial of due process in the omission to require the corporation's agent to give it such notice.

The power of the State altogether to exclude the corporation, and the consequent ability to condition its entrance into the State, distinguishes this case from those involving substituted service upon individuals, *Flexner* v. *Farson*, 248 U. S. 289; *Wuchter* v. *Pizzutti*, 276 U. S. 13, whose entrance into a State may render them amenable to action there, only if the statute providing for substituted service incorporates reasonable provision for giving the defendant notice of the initiation of litigation, *Hess* v. *Pawloski*, 274 U. S. 352. The fact that appellant qualified to do business in the State and complied with the registration statute also distinguishes cases of attempted service on a state official pursuant to a statute with which the defendant corporation had never complied, and where at the time of suit it had removed from the state and was transacting no business there. *Old Wayne Mutual Life Assn.* v. *McDonough, supra; Consolidated Flour Mills Co.* v. *Muegge*, 127 Okla. 295; 278 U. S. 559.

Appellant suggests that it was denied due process because the Act demands service upon the Secretary of State, whereas the summons and complaint were handed to an assistant Secretary. The State court has held the service sufficient since the assistant Secretary in contemplation of law was the Secretary. This construction of the statute raises no federal question.

Complaint is made because other legislation validates substituted service on domestic corporations having no office in Washington, and on foreign insurance companies registered to do business therein, only if the Secretary of State sends notice to the defendant. It is said that a failure to make similar provision with respect to other foreign corporations deprives the appellant of the equal protection of the laws. The contention is without merit. The legislature was entitled to classify corporations in this respect, and a mere difference in the method of prescribing how substituted service should be accomplished works no unjust or unequal treatment of the appellant. Compare *National Union Fire Ins. Co.* v. *Wanberg*, 260 U. S. 71.

The judgment is affirmed.